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# Reimagining Merit as Achievement

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# REIMAGINING MERIT AS ACHIEVEMENT

Aaron N. Taylor\*

*Higher education plays a central role in the apportionment of opportunities within the American meritocracy. Unfortunately, narrow conceptions of merit limit the extent to which higher education broadens racial and socioeconomic opportunity. This article proposes an admissions framework that transcends these limited notions of merit. This “Achievement Framework” would reward applicants from disadvantaged backgrounds who have achieved beyond what could have reasonably been expected. Neither race nor ethnicity is considered as part of the framework; however, its nuanced and contextual structure would ensure that racial and ethnic diversity is encouraged in ways that traditional class-conscious preferences do not. The overarching goal of the framework is to help loosen the “Gordian knot” binding race to class by ensuring that higher education opportunities are apportioned in true meritocratic fashion.*

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## INTRODUCTION

I am very fortunate. I have a great job. I get paid a good wage, work manageable hours (often from the comfort of my home) and have a high-level of professional autonomy. The most oppressive part of my job is the suit and tie I choose to wear on days that I teach. Interestingly, it is this choice of attire that often serves as a compelling reminder of how fortunate I am and how our meritocracy exalts some and devalues others.

When I walk into my law school, I am often struck by the extent to which I am different. Naturally drawn to familiar faces, I notice that those who look most like me are usually dressed very differently from me. I am in a suit. They are in a uniform. I am carrying the tools of my trade—textbooks, a laptop. They are carrying (and pushing) their tools—a broom and garbage can. I am living what many would describe as the American Dream. They are living what is often a nightmare of low wages, little independence, and little respect.

This scene is all-too-common in the United States, where your station in life is heavily dependent on your starting point. My law school is located in St. Louis, Missouri, which is located in a metropolitan area that typifies American inequality. The demographics of the City of St. Louis look very different from those of its distinct municipal neighbor, St. Louis County.<sup>1</sup>

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<sup>1</sup> The City of St. Louis and St. Louis County are separate administrative entities. The city is surrounded by the county on all sides, except the east, which borders the Mississippi River. *See, e.g.*, City of Saint Louis Recorder of Deeds and Vital Records Registrar, Websites for St. Louis Area Counties, State of Missouri, and State of Illinois, <http://www.stlouiscityrecorder.org/areacounties.html> (last visited Dec. 26, 2012).

In 2010, median household income in the county was 71% higher than in the city.<sup>2</sup> Further, homeownership rates<sup>3</sup> and the value of those homes<sup>4</sup> exhibit disparities that seem illogical given the geographical closeness of the city and the county.

Disparities play out in schools as well. Between St. Louis city and county, there are 24 school districts—one city district, 22 regular county districts, and one district serving special education students throughout the county.<sup>5</sup> Like other city school districts, St. Louis Public Schools (SLPS) suffers severe racial and socioeconomic isolation. Black students make up more than 80 percent of the district,<sup>6</sup> and more than 87 percent of students qualify for free or reduced lunch.<sup>7</sup> Racial and socioeconomic isolation are pervasive among the county districts as well. In eleven districts county districts, seventy-five percent or more of the students are either black or

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<sup>2</sup> Compare *State & County QuickFacts, St. Louis County, Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/29189.html> (listing median county income as \$57,561) [Hereinafter *County QuickFacts*], with *State & County QuickFacts, St. Louis (city), Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/2965000.html> (listing median city income as \$33,652) [Hereinafter *City QuickFacts*].

<sup>3</sup> Compare *County QuickFacts, supra* note 2 (listing the 2007-2011 county homeownership rate as 72.5%), with *City QuickFacts, supra* note 2 (listing the 2007-2011 city homeownership rate as 47.2%).

<sup>4</sup> Compare *County QuickFacts, supra* note 2 (listing the 2007-2011 median county home value as \$179,300), with *City QuickFacts, supra* note 2 (listing the 2007-2011 median city home value as \$122,200).

<sup>5</sup> Saint Louis County Missouri, School Districts, <http://www.stlouisco.com/YourGovernment/OtherGovernmentAgencies/CountySchoolDistricts> (listing all the school districts in St. Louis city and county).

<sup>6</sup> In 2012, students of color overall made up 86.4% of the district's 22,516 students. Eighty percent of the students were black, 13.6% were white, 3.3% were Hispanic, 2.9% were Asian, and 0.2% were Native American. Missouri Dep't of Elementary and Secondary Educ., St. Louis City School District, [http://mcids.dese.mo.gov/quickfacts/SitePages/DistrictInfo.aspx?ID=\\_bk8100130013005300130013005300](http://mcids.dese.mo.gov/quickfacts/SitePages/DistrictInfo.aspx?ID=_bk8100130013005300130013005300) (click on the Student Demographics link)

<sup>7</sup> *Id.*

white.<sup>8</sup> Also, in eleven, more than half the students qualify for free or reduced lunch.<sup>9</sup>

Unsurprisingly, disparities among St. Louis area school districts have an undeniable racial character. Of the seven area districts with black student enrollments above 50%, all have free or reduced lunch rates of at least 60 percent, compared to only two of the 15 majority white districts.<sup>10</sup> All of the majority black districts have graduation rates below the state average, compared to only one of the majority white districts.<sup>11</sup> In five of the seven majority black districts, a lower proportion of graduates enter four-year colleges than the state average, compared to only four of the fifteen majority white districts.<sup>12</sup> Moreover, in four of the majority black districts, the proportion of graduates immediately undertaking *any* post-secondary education is lower than the state average, compared to only one of the majority white districts.<sup>13</sup>

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<sup>8</sup> Five county school districts and the city district have black enrollments ranging from 77.5% to 97.9%. Five county districts have white enrollments ranging from 76.8% to 86.3%. Missouri Dep't of Elementary and Secondary Educ., District Demographic Data, <http://mcde.dese.mo.gov/guided inquiry/District%20and%20Building%20Student%20Indicators/District%20Demographic%20Data.aspx> (choose desired school district and school year to view data).

<sup>9</sup> Among these districts, the percentage of students who qualify for free or reduced lunch range from 50.7% to 92.2%. *Id.*

<sup>10</sup> For purposes of this discussion, two districts are excluded. The Special School District of St. Louis County is excluded because it serves students across all county school districts. Ritenour School District is excluded because it is essentially equal parts white (41%) and black (39%), though its other demographics and outcomes look very similar to those of the majority black districts. *Id.*

<sup>11</sup> The average graduation rate for the state is 87%. Graduation rates in the majority black school districts range from 63.2% to 86.7%. Rates in the majority white districts range from 81.1% to 99.5%. Missouri Dep't of Elementary and Secondary Educ., District Graduation Rates, <http://mcde.dese.mo.gov/guided inquiry/District%20and%20Building%20Graduation%20and%20Dropout%20Indic/District%20Graduation%20Rates.aspx> (choose desired school district and school year to view data).

<sup>12</sup> The average four-year college entry rate for the state is 36.5%. The average rate in the majority black districts ranges from 23.9% to 47%. Rates in the majority white districts range from 19.1% to 83.2%. Missouri Dep't of Elementary and Secondary Educ., District Graduation Analysis, <http://mcde.dese.mo.gov/guided inquiry/District%20and%20Building%20Graduation%20and%20Dropout%20Indic/District%20Graduate%20Analysis.aspx> (choose desired school district and school year to view data).

<sup>13</sup> The state average for graduates entering a college or technical school of any type immediately after high school is 70.8%. The average rate in the majority black districts

The disparities in graduation rates should not be surprising given that students in all of the majority black districts are more likely to receive long-term out-of-school suspensions, with the rate in one district being almost eight times the state average.<sup>14</sup> The college-going disparities should not be surprising given disparities in average ACT scores<sup>15</sup> and disparities in the proportion of students who even take the test.<sup>16</sup> And none of this should be surprising given that three of the seven majority black districts are only provisionally accredited by the state and one lacks any accreditation at all.<sup>17</sup> Disparities such as these, which are intensified in the St Louis metropolitan area by the presence of 345 private schools,<sup>18</sup> foster the demographical optics within my law school, and those of innumerable other spaces all over this country.

Education reformer John Dewey proffered that one of the functions of schools is “to see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born, and to come

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ranges from 61.7% to 92.8%. Rates in the majority white districts range from 62.8% to 95.4%. *Id.*

<sup>14</sup> The state average for district students being suspended for 10 or more consecutive days is 1.6%. The average rate in the majority black districts ranges from 2.2% to an astounding 12.4%. Rates in the majority white districts range from 0.1% to 2.3%. Missouri Dep’t of Elementary and Secondary Educ., District Discipline Incidents, <http://mcde.dese.mo.gov/guided inquiry/District%20and%20Building%20Student%20Indicators/District%20Discipline%20Incidents.aspx> (choose desired school district and school year to view data).

<sup>15</sup> The seven majority black districts had the seven lowest average ACT scores, ranging from 15.6 (18<sup>th</sup> percentile) to 18.7 (41<sup>st</sup> percentile). The fifteen majority white districts had average scores ranging from 18.9 (41<sup>st</sup> percentile) to 26.4 (85<sup>th</sup> percentile). Missouri Dep’t of Elementary and Secondary Educ., District ACT, <http://mcde.dese.mo.gov/guided inquiry/District%20and%20Building%20Student%20Indicators/District%20ACT.aspx> (hereinafter District ACT). *See, also*, ACT Inc., National Ranks for Test Scores and Composite Score (2012), <http://www.actstudent.org/scores/norms1.html> (listing ACT percentiles).

<sup>16</sup> Five of the seven majority black districts had a lower percentage of students take the ACT than the state average of 66.98%. Six of the 15 majority white districts had lower proportions. District ACT, *supra* note 15.

<sup>17</sup> For the 2012-2013 school year, Jennings, Normandy, and St. Louis City School Districts are provisionally accredited by the state. Riverview Gardens school district is unaccredited. Missouri Dep’t of Elementary and Secondary Educ., District Accreditation, <http://mcde.dese.mo.gov/guided inquiry/District%20and%20School%20Information/District%20Accreditation.aspx> (choose desired school district and school year to view data).

<sup>18</sup> St. Louis Regional Chamber & Growth Association, Education (K-12) and Special Needs, <http://www.stlrcga.org/x439.xml> (last visited Dec. 26, 2012). (listing the number of private schools in the St. Louis metropolitan area).

into living contact with a broader environment.”<sup>19</sup> But it is clear that educational inequality in America forestalls this function. For too many, inequality has dampened the “invigorating sense of possibility” upon which this country is said to have been founded.<sup>20</sup> The adage “You’re a product of your environment” is alarmingly true, and at first blush seems un-American. But this American Dream...for some reality may not be as diametrical to our core values as we would like to think. After all, slave-owning and racism were common among the founders of this country.<sup>21</sup> And the notion of all men being created equal surely did not apply equally to all men (and no women) when it became a guiding principle.<sup>22</sup> Even today, most Americans believe that we live in a meritocracy, while also acknowledging (and accepting) the roles that wealth and social status play in preserving inequality.<sup>23</sup> As a result, the legacy of discrimination dating back to the birth of this country continues to manifest. Our meritocracy is its primary conduit.

This article proposes a new meritocracy—one that adheres to the idea that “merit...is not simply where you wind up, but what you did with what you were given.”<sup>24</sup> This new meritocracy goes beyond our obsession with

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<sup>19</sup> JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 21 (2009).

<sup>20</sup> David Kamp, *Rethinking the American Dream*, VANITY FAIR, Apr. 2009, available at <http://www.vanityfair.com/culture/features/2009/04/american-dream200904>.

<sup>21</sup> Thomas Jefferson provides the most glaring example of hypocrisy among the founders of the United States. He has been characterized as a “consistent opponent of slavery,” yet he owned African slaves himself and believed that blacks were childlike, inferior beings. The Thomas Jefferson Foundation, Inc., *Thomas Jefferson and Slavery*, <http://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-slavery> (last visited Dec. 26, 2012).

<sup>22</sup> The hypocrisy of the Declaration of Independence, in light of the continued maintenance of African enslavement, was not lost on the commentators of the day. Thomas Day, a British abolitionist, argued “If there be an object truly ridiculous in nature, it is an American patriot signing resolutions of independence with the one hand, and with the other brandishing a whip over his affrighted slaves.” NATIONAL HUMANITIES CENTER, DOES “ALL MEN ARE CREATED EQUAL” APPLY TO SLAVES? CALLS FOR ABOLITION, 1773-1783 4 (2010) <http://nationalhumanitiescenter.org/pds/makingrev/rebellion/text6/slaveryrights.pdf>

<sup>23</sup> See, e.g., Richard T. Longoria, *Meritocracy and Americans’ Views on Distributive Justice* 86 (2006) (unpublished Ph.D. dissertation, University of Maryland, College Park), available at <http://drum.lib.umd.edu/bitstream/1903/4286/1/umi-umd-4000.pdf> (“[Most Americans] believe that intelligence, skill, and hard work...are actually rewarded. But they also know that non-merit items, such as social connections, family background, and more opportunities to being with, are reasons for peoples’ success.”).

<sup>24</sup> William J. Goggin, A “Merit-Aware” Model for College Admissions and Affirmative Action, 83 POSTSECONDARY EDUC. OPPORTUNITY 3 (1999), <http://www.postsecondary.org/last12/83599Goggin.pdf>.

limited indicators of ability and rewards actual achievement. The conception is contextual in nature and its “Achievement Framework” is inspired by the writings of John Rawls. Rawls stressed the vital nature of equality of opportunity and the need for society to cure inequality through affirmative measures.<sup>25</sup> The Achievement Framework is offered within the context of higher education, with particular foci on law school admissions and the black/white racial paradigm. Through the framework, applicants from disadvantaged backgrounds who have achieved beyond what could have reasonably been expected, given their background, are rewarded. The fundamental goal is to convert disadvantages in life into advantages in the admissions process.

Given the current legal and political climate, race and ethnicity are not considered within the Achievement Framework. But while the framework has a class-conscious premise, it is designed to encourage racial and ethnic diversity. Most class-conscious affirmative programs are ineffective at fostering racial and ethnic diversity, due to the sheer number of poor whites and the programs’ blunt treatment of disadvantage.<sup>26</sup> UCLA Law School’s class-conscious affirmative action program resulted in a 70% drop in the number of black students in its entering class.<sup>27</sup> But unlike typical class-conscious affirmative action programs, the Achievement Framework accounts for factors that would better reflect race-based wealth and educational disparities.

Part I of this article illustrates the concept of meritocracy. Part II chronicles how standardized test scores came to be associated with merit and how factors such as income and wealth influence these scores. Part III discusses the role of the family unit in fostering inequality. Part IV explains some of the root causes of contemporary inequality. Part V describes preferences embedded into the American higher education meritocracy, with particular focus on law school admissions. Lastly, Part VI introduces the Achievement Framework.

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<sup>25</sup> JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001).

<sup>26</sup> See, e.g., ANTHONY P. CARNEVALE & STEPHEN ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 59 (2003), available at [http://tcf.org/publications/pdfs/pb252/carnevale\\_rose.pdf](http://tcf.org/publications/pdfs/pb252/carnevale_rose.pdf) (arguing that class-conscious affirmative action programs should not replace race conscious programs because “while African Americans and Hispanics are disproportionately from low-SES families, low-SES families are disproportionately White.”).

<sup>27</sup> Richard Sander, *Experimenting with Class-based Affirmative Action*, 47 J. LEGAL EDUC. 472, 473 (1997) (attributing a third of the decline to application trends).



## I: MERITOCRACY

Most Americans believe that the United States is a meritocracy—a place where those most deserving of power, wealth, and influence will succeed through innate aptitude and hard work. Conversely, those lacking natural talents will fail under the weight of their own inadequacies. The concept of meritocracy is central to the American story. It provides justification for the many inequities that pervade American life.<sup>28</sup> It allows us to rationalize the apportionment of opportunities based on a narrow range of unequally exposed factors.<sup>29</sup>

Merit by its very nature is subjective; but embedded in all its conceptions is the notion of worthiness.<sup>30</sup> Some are worthy, others unworthy. That is the paradigm within which merit is conceived and the meritocracy operates. Thus, the contours of the paradigm are critically important, as they determine winners and losers.

The beef industry provides a useful analogy. In that meritocracy, a meat grader determines which animals will be consumed in fine steakhouses and which will end up in jerky factories. She does this mainly by examining the quality of the animal's marbling (or intramuscular fat).<sup>31</sup> This is the basic function of a meritocracy, sorting the good meat from the bad—the worthy from the unworthy—and assigning each to its “rightful” place in life (or in the case of beef cattle, death).

Think of admissions officers as meat graders, standardized test scores as marbling, “elite” colleges and universities as fine steakhouses, and limited or foreclosed pathways as jerky factories. And like ranchers trying to raise the best marbled beef, some parents employ strategies to ensure that their

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<sup>28</sup> See, e.g., Longoria, *supra* note 23, at 60 (displaying survey results showing that most respondents agree that people are rewarded for their effort, intelligence, and skill, and that everyone has equal opportunities to succeed).

<sup>29</sup> See, e.g., NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 6 (2000) (“A test of one narrow quality, the ability to perform well in school, stands firmly athwart the path to success.”)

<sup>30</sup> Oxford defines “merit” as “the quality of being particularly good or worthy, especially so as to deserve praise or reward” <http://oxforddictionaries.com/definition/english/merit>

<sup>31</sup> The US Department of Agriculture has devised eight grades for meat from slaughtered steers, heifers, and cows (Prime being best, Canner being worst). These grades determine meat price as well as end user. Top steakhouses only buy Prime cuts. U.S. DEPT. OF AGRIC., U.S. STANDARDS FOR GRADES OF SLAUGHTER CATTLE 4 (1996) <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3062519>.

children get the best test scores. The parents' goal is to manipulate the narrow contours of the meritocratic paradigm to ensure that their children are sorted into the finest educational "steakhouses" and towards all the other advantages that flow therefrom.

The term "meritocracy" entered the popular lexicon in 1958 with the publication of Michael Young's aptly named book, *The Rise of the Meritocracy*.<sup>32</sup> Young's book was a wry satirical account of life in Britain as it adopted a system where leaders were chosen based on talents, instead of birthright. The coming of the industrial age and the transition away from an agrarian economy provided the requisite necessity for the transition.<sup>33</sup> This new society needed to be run efficiently by the "cleverest people," not "morons" of gentle birth.<sup>34</sup>

Young's concept of meritocracy was based on two premises: 1) Class divisions are universal and inevitable;<sup>35</sup> and 2) inequality of outcome is tolerated when everyone has equality of opportunity.<sup>36</sup> This was Young's "code of morality." Equality of opportunity would lead to the acceptance of meritocratic outcomes based on an "equal status for equal intelligence" philosophy.<sup>37</sup>

Each social class was seen as a microcosm of society as a whole.<sup>38</sup> Each had its own share of individuals "enlivened by excellence" and many others who were "deadened by mediocrity."<sup>39</sup> Under the nepotistic system, geniuses of the upper-classes were allowed to ascend to positions of power and prestige, while those of the lower-classes were most often consigned to

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<sup>32</sup> Young "made up" the word and structured his book around it over the objection of a "classical scholar" friend who predicted Young would be the target of scorn for combining Latin and Greek words in such a way. MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* XII (1999).

<sup>33</sup> *Id.* at xiii. See, also, JAMES S. COLEMAN, *THE CONCEPT OF EQUALITY OF EDUCATIONAL OPPORTUNITY* 1 (1967), available at <http://www.eric.ed.gov/PDFS/ED015157.pdf> (discussing how a child's mobility in pre-industrial Europe was dictated not only by his father's "station in life," but also by his lifelong obligations to the agricultural-based "family production enterprise").

<sup>34</sup> YOUNG, *supra* note 32, at 11. Young made liberal usage of "moron" to describe people of lesser intelligence. See, e.g., *id.* at 4.

<sup>35</sup> *Id.* at 142.

<sup>36</sup> *Id.* at 142.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 4.

<sup>39</sup> *Id.* at 30.

lesser roles.<sup>40</sup> And it was this “basic injustice,” along with the ascension of upper-class morons, that Young’s meritocracy sought to end.<sup>41</sup>

The book chronicles the imposition of the meritocracy, including opposition<sup>42</sup> and the evolving role of schools.<sup>43</sup> But it is Young’s illustration of British society after the meritocratic system had been in place for over a century that is most interesting. He imagines a society where all the formerly lower-class geniuses have ascended to the upper-class. Conversely, the upper-class morons who had been propped up by their lineage now inhabited the lower class. The eventual effect of this sorting is that social class became a reflection of innate talent, creating an intellectual “gulf between the classes.”<sup>44</sup> In this society, social classes were no longer microcosms of society. The upper-class enjoyed its status due to its talents; the lower-class endured its status due to its lack of talent.

The evolution hastened by Young’s meritocracy had profound effects. The meritocratic code of morality was embraced, and therefore everyone accepted his place.<sup>45</sup> Dissension emanating from the lower classes was squelched by their utter inability to dissent effectively<sup>46</sup> and by the hope that a descendant would one day ascend within this anointed system.<sup>47</sup> Lastly, according to Young, notions of equality became obsolete because inequality reflected unequal talents—an accepted, even desired result.<sup>48</sup> Elitism became hereditary.<sup>49</sup>

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<sup>40</sup> *Id.* at 151.

<sup>41</sup> *Id.*

<sup>42</sup> Young illustrated opposition as principally coming from individuals who disagreed with the idea of innate superiority among humans, and thus disagreed with the inequality created by the meritocracy. *See, e.g., id.* at 158.

<sup>43</sup> Young saw the role of schools as diminishing the effect of upper-class families conferring advantages to their children that were unavailable to lower-class families. A principle role of schools was to sort and track children based on their ability, irrespective of social class. *See, e.g., id.* at 30.

<sup>44</sup> *Id.* at 96.

<sup>45</sup> “Today all persons, however humble, know they have had every chance [to demonstrate his talents].” *Id.* at 97.

<sup>46</sup> *Id.* at 101 (“[The lower classes] are unambitious, innocent, and incapable of grasping clearly enough the grand design of modern society to offer any effective protest.”).

<sup>47</sup> *Id.* at 100 (“As long as all have opportunity to rise through the schools, people can believe in immortality: they have a second chance though the younger generation.”).

<sup>48</sup> *Id.* at 116 (“Once equality of opportunity was a fact, to go on preaching equality was obviously...unnecessary.”).

<sup>49</sup> *Id.* at 166 (“The top of today are breeding the top of tomorrow...the elite is on the way to becoming hereditary; the principles of heredity and merit are coming together.”).

Young characterized *The Rise of the Meritocracy* as a “counterargument as well as argument” for the broad-based population sorting being implemented in Britain and the United States in the mid-20<sup>th</sup> century. His fundamental premises—the inevitability of class divisions and the belief in an ability-based conception of equality—remain powerful meritocratic principles today. The legitimacy of these premises, however, is called into question by the inequality of opportunity that pervades our society. We have a meritocracy only in theory, because it fails to adhere to the moral code.

## II: THE ROLE OF STANDARDIZED TESTS

In *The Rise of the Meritocracy*, education played a central role in the apportionment of opportunities.<sup>50</sup> Standardized test scores signaled merit and thus determined who received the best educational benefits. The history of standardized tests dates back to the early 20<sup>th</sup> century. The tests with which we are familiar descend, in principle, from the first test of intelligence developed in 1905 by psychologist Alfred Binet.<sup>51</sup> Binet’s test required written responses, unlike the multiple choice tests of today, and its purpose was to identify students in need of remedial help.<sup>52</sup> The flipping, of sorts, of Binet’s purpose occurred when Lewis Terman, a psychologist and prominent eugenicist, introduced the term “intelligence quotient” or IQ and pioneered the introduction of intelligence testing.<sup>53</sup>

The belief that a test could measure innate intelligence had “mythical” appeal. Per the narrative, the test could analyze a person’s brain (“see the invisible”) and based on that analysis assess his chances of academic success (“predict the future”).<sup>54</sup> The otherworldly allure of intelligence testing enthralled many, especially eugenicists. The idea of meritocracy, with its emphasis on fostering the ascension of those deemed superior in intellect, was compatible with the eugenicist aim of “securing that humanity

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<sup>50</sup> *Id.* at xiv (“Practically and ethically, a meritocratic education underpins meritocratic society.”).

<sup>51</sup> LEMANN, *supra* note 29, at 17.

<sup>52</sup> *Id.* at 17.

<sup>53</sup> Mitchell Leslie, *The Vexing Legacy of Lewis Terman*, STANFORD MAGAZINE (Jul./Aug. 2000)

<http://www.stanfordalumni.org/news/magazine/2000/julaug/articles/terman.html>.

<sup>54</sup> LEMANN, *supra* note 29, at 18.

[is] represented by the fittest races.”<sup>55</sup> Thus, the promise of intelligence testing as a tool of base social engineering struck a resounding chord.

The Army was the first large-scale consumer of intelligence tests. During World War I, more than 2 million soldiers took IQ tests.<sup>56</sup> The purpose of administering the tests was two-fold: to identify officer candidates and to build up statistical evidence of the tests validity and reliability.<sup>57</sup> Shortly thereafter, these tests would make their entry into higher education—and, unsurprisingly, Harvard would provide a prominent early perch.

When IQ-descended standardized tests made their appearance in the United States, the notion of meritocracy (though not yet so named) had long been part of the national dialogue. In promoting his idea of universal public education (for white males), Thomas Jefferson proffered the idea of using advanced education to train what he called a “natural aristocracy.”<sup>58</sup> The natural aristocracy would be comprised of individuals who became leaders of the young republic based on “virtue and talents,” as opposed to the “artificial aristocracy” that ascended due to “birth and wealth.”<sup>59</sup>

Inspired by Jefferson’s writings, James Conant, Harvard President from 1933 until 1953, sought to devise a way of breaking the influence of the prep school network that dominated Ivy League admissions.<sup>60</sup> Conant was seeking to change Harvard’s mostly un-academic, insular culture<sup>61</sup> by shifting the focus of admissions consideration from non-academic criteria

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<sup>55</sup> Galton.org, Eugenics; Its Definition, Scope, and Aims, <http://galton.org/essays/1900-1911/galton-1904-am-journ-soc-eugenics-scope-aims.htm>. See, also, *id.* (analogizing “barbarous races...like the negro” to domesticated animals and lamenting their persistent fertility).

<sup>56</sup> LEMANN, *supra* note 29, at 24.

<sup>57</sup> *Id.*

<sup>58</sup> Thomas Jefferson, *Thomas Jefferson to John Adams*, in 1 THE FOUNDER’S CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2000), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch15s61.html>.

<sup>59</sup> In extolling his natural aristocracy, Jefferson writes in a tone surprising for its eugenicist flair about how the “commerce of love” has been “made subservient...to wealth and ambition by marriages without regard to the beauty, the healthiness, the understanding, or virtue of the subject from which we are to breed.” *Id.*

<sup>60</sup> JEROME KARABEL, *THE CHOSEN* 169 (2005).

<sup>61</sup> In a series of essays published in the mid/late 1940s describing Harvard’s admissions process, Wilbur Bender, dean of the College, stated that the most significant institutionalized preferences benefitted legacies, athletes, and full-payers. *Id.* at 186. See, also, *id.* at 192 (discussing how “attracting top scholars was by no means [Harvard’s] primary goal”).

such as legacy status, athletic ability, and “character” to that of academic merit.<sup>62</sup> Upon hearing about the awesome potential of IQ testing, he decided that it would be his tool of choice. Harvard’s foray into standardized testing began as an attempt to select scholarship recipients. The Harvard National Scholarship was Conant’s brainchild. He saw the scholarship program as a means of instilling Jeffersonian meritocratic ideology.<sup>63</sup> The purpose was to bring “any man with remarkable talent...whether he be rich or penniless” to Harvard for his education.<sup>64</sup>

Merit, as defined by Conant, was “native intelligence”<sup>65</sup> and “potential for success in college work”.<sup>66</sup> Specifically, Conant wanted the scholarships “to be awarded only to those expected to be the top-ranking scholars of the class.”<sup>67</sup> The question for many, however, was how could such potential be identified, particularly given that the scholarship was open to applicants nationwide. It did not take long for Conant to be convinced that the SAT, a descendant of the standardized tests administered by the Army, was the means.<sup>68</sup> For Conant, the SAT provided both a mythical and a practical means of finding the talent for which he was looking.<sup>69</sup>

In 1934, Harvard began using the SAT, in conjunction with transcripts and recommendations, to select its first ten National Scholars.<sup>70</sup> Eight of the ten would go on to be elected Phi Beta Kappa, providing a level of vindication of Conant’s reliance on the test.<sup>71</sup> The academic success of these students had wide-ranging effects. Culturally, perceptions of these “book worms”

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<sup>62</sup> The reliance on non-academic criteria is said to have allowed Harvard to discriminate against Jews “while shielding [itself] from external scrutiny.” *Id.* at 170.

<sup>63</sup> Conant’s higher education meritocracy was a departure from the norm of that time, but is very familiar to contemporary observers. Central tenets include “the principle that admission to college should be based...on talent and accomplishment”, be need-blind and full-aid, and be heavily reliant on the SAT. *Id.* at 139.

<sup>64</sup> *Id.* at 139.

<sup>65</sup> LEMANN, *supra* note 29, at 27.

<sup>66</sup> KARABEL, *supra* note 60, at 140.

<sup>67</sup> *Id.*

<sup>68</sup> Conant charged two of his freshman deans to find an appropriate test for measuring academic talent. They settled on the SAT, which had been recently developed by the College Board. See, e.g., *id.*

<sup>69</sup> LEMANN, *supra* note 29, at 28 (discussing how Conant was concerned about uncovering the best high school seniors among the “vastness of public education”).

<sup>70</sup> *Id.* at 38.

<sup>71</sup> *Id.* at 39.

began to reflect shifting notions of what it meant to be a “Harvard man.”<sup>72</sup> Academic talent was finding the place Conant envisioned for it. The success also induced other Ivy League schools to join Harvard “in a system to make multiple-choice mental tests the admission device for all scholarship students.”<sup>73</sup> By the late 1930s, these examinations were being administered to more than 2000 high school seniors all over the country seeking scholarship admission to Ivy League schools.<sup>74</sup> But the ultimate effect of the system’s success is that it serves as the model for the “basic mechanism for sorting the American population” to this day.<sup>75</sup>

The steady embrace of standardized tests as a means of apportioning societal benefits, be it higher education or advancement in the military, took place within a climate of great excitement about the potential power of these tests. After all, the Harvard experience coupled with data from the millions of soldiers who took the tests, seemed to confirm the tests’ mythical power. To many, the Harvard experience alone proved that standardized tests could indeed see the invisible and predict the future.

Around the time Harvard was searching for a scholarship selection tool, Carl Brigham, one of the original developers of the SAT, began expressing grave reservations about the conclusions he and others had reached. Brigham, like many early developers of intelligence tests, was a eugenicist. As such, he adhered to the “central tenet” that intelligence tests “measured a biologically grounded, genetically inherited quality that was tied to ethnicity.”<sup>76</sup>

In his seminal work, *A Study of American Intelligence*, Brigham used data showing score disparities among various demographic groups in the military to buttress his fundamental theories.<sup>77</sup> But in 1928, two years after

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<sup>72</sup> *Id.* See, also, *id.* (explaining how the program and the recruitment efforts associated therewith led to an overall increase in applications for admission).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (explain that the tests were given in the afternoon after the students took the SAT).

<sup>75</sup> *Id.* at 28. See, also, James Fallows, *The Tests and the “Brightest”: How Fair Are the College Boards*, THE ATLANTIC MONTHLY, Feb. 1980, available at <http://www.theatlantic.com/past/docs/issues/95sep/ets/fall.htm> (quoting a representative from the NAACP thus: “Standardized tests are used from the cradle to the grave, to select, reject, stratify, classify, and sort people”).

<sup>76</sup> LEMANN, *supra* note 29, at 33.

<sup>77</sup> *Id.* at 30 (“Officers score higher than enlisted men, the native-born scored higher than the foreign-born, less recent immigrants scored higher than more recent immigrants, and whites scored higher than Negroes.”)

the SAT was first administered,<sup>78</sup> he publicly recanted those views.<sup>79</sup> One quote in particular, which appeared in a manuscript that unfortunately went unpublished, deserves full presentation:

*The test movement came to this country some twenty-five or thirty years ago accompanied by one of the most glorious fallacies in the history of science, namely, that the tests measured native intelligence purely and simply without regard to training or schooling. I hope nobody believes that now. The test scores very definitely are a composite including schooling, family background, familiarity with English and every else relevant and irrelevant. The 'native intelligence' hypothesis is dead.*<sup>80</sup>

Brigham, a father of the SAT, someone who had professional *and* personal reasons to believe in the power of so-called intelligence tests, harbored fundamental concerns about them. He wanted to make known that the narrative he helped promote was a fraud. Intelligence tests do not measure nature; they measure nurture. They measure the benefits of being born to the “right” family and the burdens of being born to the “wrong” one. Therefore, overreliance on these tests is incompatible with the Jeffersonian concept of meritocracy, which was premised, at least ostensibly, on identifying those worthy of leadership roles, irrespective of social class or family background.<sup>81</sup>

In *The Rise of the Meritocracy*, Young wrote that intelligence, as operationalized within the meritocracy, is merely a “convenient” reference to “qualities needed to benefit from higher education,” not “all-round intelligence.”<sup>82</sup> But no non-satirical argument can be made for apportioning life’s opportunities based on deceptive and narrow

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<sup>78</sup> See, e.g., *id.* at 32 (“The official date of the introduction of the SAT into American life is June 23, 1926...8,040 high school students...took the test that day and had their scores reported to the colleges they wanted to attend.”).

<sup>79</sup> Brigham’s first public recantation, in 1928, was delivered in a speech before a group of eugenicists. He then followed up with two written recantations: a formal retraction of *A Study of American Intelligence* in 1930 and follow-up titled, *A Study of Error*. *Id.* at 33.

<sup>80</sup> *Id.* at 34.

<sup>81</sup> Fallows, *supra* note 75 (quoting a representative from the NAACP arguing that standardized tests “are used in ways that keep certain segments of the population from realizing their aspirations. Most of all they limit the access of blacks and other minorities to higher education”).

<sup>82</sup> YOUNG, *supra* note 32, at 61.



convenience. Standardized tests are ubiquitous<sup>83</sup> because they are convenient. Unfortunately, misuse renders them powerful means of preserving the prevailing power structure.<sup>84</sup> This misuse fosters the association of test scores with innate intelligence and, thus, merit. Almost a century ago, Brigham expressed hope that this farce had fallen outside the realm of belief. Sadly, his hope was unfulfilled then—and it remains even more so today.

### *A. The Association of Class and Scores*

There is an undeniably direct association between economic class and standardized test scores. Given the role that standardized tests play in apportioning life's benefits, this association renders access to financial resources a proxy for merit. Such conflation is dangerous, especially considering the constructed association between economics and race.<sup>85</sup> On the SAT, students from families with incomes above \$200,000 scored highest on every section. When compared to the poorest students (those from families with incomes of \$20,000 or less), the richest students scored 30% higher on the Critical Reading section, 27% higher on the Mathematics section, and 30% higher on the Writing section.<sup>86</sup> The higher

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<sup>83</sup> See, e.g., College Board, FAQs, <http://press.collegeboard.org/sat/faq> (asserting that “nearly all four-year, not-for-profit undergraduate colleges and universities” require the SAT) (last visited Dec. 26, 2012) [Hereinafter College Board FAQs]. See, also, AM. BAR ASSOC., 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 36 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf) (requiring law schools to use the LSAT in the admissions process or another test that the school has determined to be “valid and reliable”).

<sup>84</sup> Fallows, *supra* note 75 (citing arguments that assert that standardized tests “reinforce and legitimize every inequality that now exists”). See, also, LAW SCHOOL ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES (2005), available at <http://www.lsac.org/LSACResources/Publications/PDFs/CautionaryPolicies.pdf> (“The LSAT should be used as only one of several criteria for evaluation and should not be given undue weight solely because its use is convenient.”).

<sup>85</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 67 (1997) (“The consummate genius of America—the chance for the individual to get ahead on his own merits and rise [and fall] according to his own talent—is thus seriously compromised by a wealthy and powerful upper class.”)

<sup>86</sup> SAT scores for the poorest students were 434 on Critical Reading, 457 on Mathematics, and 430 on Writing. Scores for the richest students were 563, 579, and 560 on the sections respectively. COLLEGE BOARD, 2009 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE

income/higher score correlation held for each section of the test across the ten income parameters used by the College Board.<sup>87</sup>

Class-based score disparities are apparent in other ways too. Students who planned to apply for college financial aid scored lower on each section than both students who did not plan to apply and students who were not sure.<sup>88</sup> Also, higher parental education resulted in higher SAT scores for their children.<sup>89</sup> These class-based disparities contribute to race-based disparities. White students scored 23% higher on the Critical Reading section, 26% higher on the Mathematics section, and 23% higher on the Writing section than black students.<sup>90</sup>

Regrettably, the SAT is by no means unique in the manner in which background factors influence performance. Similar trends have been found on the ACT<sup>91</sup> the General Record Examination (GRE),<sup>92</sup> and the Law

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REPORT 4 (2009), available at <http://professionals.collegeboard.com/profdownload/cbs-2009-national-TOTAL-GROUP.pdf>.

<sup>87</sup> The income parameters in ascending order, along with their proportion of the total pool (in parentheses) are as follows: \$0-\$20,000 (10%); \$20,000-\$40,000 (15%); \$40,000-\$60,000 (15%); \$60,000-\$80,000 (15%); \$80,000-\$100,000 (13%); \$100,000-\$120,000 (11%); \$120,000-\$140,000 (5%); \$140,000-\$160,000 (4%); \$160,000-\$200,000 (5%); More than \$200,000 (5%). In addition, non-responders made up 35% of the pool. *Id.*

<sup>88</sup> Students who planned to apply for college financial aid made up 71% of the pool of test-takers and scored 498 on Critical Reading, 508 on Mathematics, and 488 on Writing. Scores for the 7% of students who did not plan to apply were 529, 551, and 526 on the sections respectively. Scores for the 21% of students who did not know if they would apply for financial aid were 515, 534, and 508. *Id.*

<sup>89</sup> Students whose parents had no high school diploma made up 5% of the pool of test-takers and scored 420 on Critical Reading, 443 on Mathematics, and 418 on Writing. Scores for the 31% of students whose parents had only high school diplomas were 464, 474, and 454 on the sections respectively. Scores for the 9% of students whose parents had associate's degrees were 482, 491, and 469. Scores for the 30% of students whose parents had a bachelor's degree were 521, 535, and 512. Scores for the 25% of students whose parents had graduate degree were 559, 572, and 552. *Id.*

<sup>90</sup> *Id.* at 3.

<sup>91</sup> Based on 2005 data, 70% of students from families with incomes above \$100,000 met the ACT College Readiness reading benchmark, compared to 54% of students from families with incomes of \$30,000 to \$100,000 and 33% of students from families below \$30,000. The overall rate was 51%. Stark racial disparities between white and black students exist as well. Fifty-nine percent (59%) of white students met the benchmark—the highest percentage. Only 21% of black students met it—the lowest percentage. ACT, INC., *READING BETWEEN THE LINES: WHAT THE ACT REVEALS ABOUT COLLEGE READINESS IN READING 2* (2006), available at [http://www.act.org/research/policymakers/pdf/reading\\_summary.pdf](http://www.act.org/research/policymakers/pdf/reading_summary.pdf).

School Admission Test (LSAT).<sup>93</sup> And these disparities are not lost on individuals with nefarious intent. In *United States v. Fordice*,<sup>94</sup> the U.S. Supreme Court found that Mississippi officials used ACT score minimums as an unconstitutional means of preserving the racial character of its public universities.<sup>95</sup>

So, again, one's starting point, specifically her family, is a major determinant of opportunities within our meritocracy. Indeed, the College Board acknowledges that test score disparities reflect "the unfortunate reality" of background disparities, and argues that these trends should represent "a call to take action to ensure equal opportunity and access to education for all students."<sup>96</sup>

### III: INEQUALITY AND THE FAMILY

In order for a meritocracy to be legitimate, there must be equality of opportunity. But what is equality of opportunity? Philosopher John Rawls explains thus:

*Supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of*

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<sup>92</sup> See, e.g., JERILEE GRANDY, EDUCATIONAL TESTING SERVICE, TRENDS AND PROFILES: STATISTICS ABOUT GRE GENERAL TEST EXAMINEES BY GENDER, AGE, AND ETHNICITY 88 (1999), available at

<http://www.ets.org/Media/Research/pdf/RR-99-16-Grandy.pdf>.

<sup>93</sup> See, e.g., SUSAN P. DALESSANDRO ET AL., LAW SCHOOL ADMISSION COUNCIL, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2003-2004 THROUGH 2009-2010 TESTING YEARS 19 (2010), available at

<http://www.lsac.org/lsacresources/Research/TR/pdf/TR-10-03.pdf> (listing average LSAT score for white test-takers as 153, compared to 142 blacks).

<sup>94</sup> 505 US 717 (1992).

<sup>95</sup> State officials set minimum ACT requirements for entry into each public university. Four of the five majority white universities had a minimum score of 15; the fifth had a minimum of 18, if the applicant did not have a 3.0 high school GPA. In 1985, more than seventy percent of Mississippi's black high school graduates scored below a 15, foreclosing opportunity for them to attend any of the five majority white universities. The minimum score for entry into the three majority black universities was 13. The Supreme Court found the minimum scores to be traceable to discriminatory intent and not justified by "sound educational policy." *Id.* at 734.

<sup>96</sup> College Board FAQs, *supra* note 83.

*success regardless of their social class of origin, the class into which they are born and develop until the age of reason.*<sup>97</sup>

Rawls's explanation aligns very closely with both Thomas Jefferson's concept of natural aristocracy and Michael Young's meritocracy. Everyone should have an equal opportunity to demonstrate his talents and work ethic—or, in the words of President Lyndon Baines Johnson, to “become whatever his qualities of mind and spirit would permit.”<sup>98</sup> Background factors should have little, if any, influence on whom ascends to the top of the meritocratic paradigm.

The term equality is synonymous with fairness. Thus, equality of opportunity is synonymous with fair opportunity. Fairness is also related to notions of justice.<sup>99</sup> Rawls argued that a publicly-embraced conception of justice is critical to the well-ordered function of a democratic society.<sup>100</sup> If citizens are “free and equal,” then justice, as fairness, is essential.<sup>101</sup> Fairness is the mechanism that allows democratic societies to remain tolerant of pluralism without descending into chaos.

There are many impediments to fairness and equality of opportunity; among them, the family unit is a central obstructing force. It is within the family that wealth disparities and other relics of historic inequality are operationalized. Sociologist Annette Lareau described this process in her groundbreaking study, *Unequal Childhoods*:<sup>102</sup>

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<sup>97</sup> RAWLS, *supra* note 25, at 44.

<sup>98</sup> IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 181 (2005) (quoting LBJ).

<sup>99</sup> *Id.* at 181 (quoting LBJ, “For what is justice? It is to fulfill the fair expectations of man.”)

<sup>100</sup> RAWLS, *supra* note 25, at 9 (“A well-ordered society is a society effectively regulated by some public [political] conception of justice, whatever that conception may be.”). *See, also, id.* at 32 (“In a well-ordered society the political conception is affirmed by what we refer to as a reasonable overlapping consensus.”).

<sup>101</sup> Rawls asserted that a democratic society with “free and equal” citizens is not a community (“body of persons...unified in affirming the same [or similar] doctrine”) or an association (society that people entered freely). Rather, such a society is a “system of social cooperation.” Therefore, “profound and irreconcilable differences” on issues of doctrine are inevitable, making a broad notion of “justice as fairness” among citizens essential. *Id.* at 3.

<sup>102</sup> In *Unequal Childhoods*, Lareau reported the findings of a study she led on the means in which different childrearing practices foster class-based inequality. She conducted intense “naturalistic” observations of the daily lives of 12 families, with a focus on one child within each. She classified each family into one of three social classes: middle-class, working-class, and poor. She found that middle-class parents engaged in “concerted cultivation” childrearing practices, typified by “an emphasis on children’s structured

*Social group membership structures life opportunities. The chances of attaining key and widely sought goals—high scores on standardized tests such as the SAT, graduation from college, professional jobs, and sustained employment—are not equal for all the infants whose births are celebrated by their families. It turns out that the family into which we are born, an event over which we have no control, matters quite a lot.*<sup>103</sup>

In *The Rise of the Meritocracy*, Young described the potential for “serious harm” caused by both the “selfishness” and the “failings” of the family.<sup>104</sup> The failings, according to Young, were often manifested in orphans, whose lack of self-assurance prevented them from converting their natural talents into “actual ability.”<sup>105</sup> Young characterized parental love as “biochemistry’s chief assistant” and lamented that the state was a poor substitute for the family because public investments in equal opportunity were politically unpopular.<sup>106</sup> Conversely, Young discussed how families, particularly those of means, seek to “gain unfair advantages for their offspring,” at the expense of other children.<sup>107</sup> Young saw the state’s role as a check against the “undue influence” families exert within the meritocracy.<sup>108</sup>

The transmission of cultural norms and hereditary information are primary means in which families militate against equality of opportunity. It goes without saying that families have the right, even obligation, to ensure that

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activities, language development and reasoning in the home, and active intervention in schooling.” On the other hand, parents in working-class and poor homes engaged in “natural growth” childrearing practices, typified by less structured leisure activities for children, but “clear directives” and “limited negotiation” in their interactions with parents. Lareau concluded that the childrearing practices favored by middle-class parents comported with prevailing practices adopted by various institutions with which families must interact, including schools. This compatibility gives concerted cultivation “greater promise of being capitalized into social profits than does the strategy of...natural growth found in working-class and poor homes.” ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2003).

<sup>103</sup> *Id.* at 256.

<sup>104</sup> YOUNG, *supra* note 32, at 20.

<sup>105</sup> *Id.* at 20.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 21 (“[Families] desire equal opportunity for everyone else’s children, extra for their own.”).

<sup>108</sup> *Id.*

their children have every reasonable advantage possible.<sup>109</sup> Most of us see nothing wrong with parents sending their children to the best schools, exposing them to high culture, or giving them their good looks.<sup>110</sup> “Parental altruism” of this type helps build familial bonds and instill values that are often good for society.<sup>111</sup> Therefore, completely removing the militating effects of the family is not “morally desirable,”<sup>112</sup> and in the case of genes, not yet possible.<sup>113</sup> Nonetheless, the transmission of culture and genes are often in direct conflict with notions of equal opportunity.<sup>114</sup>

Sociologist Pierre Bourdieu introduced the concept of cultural capital. He defined culture as “the general...knowledge, disposition, and skills that are passed from one generation to the next.”<sup>115</sup> He theorized that certain cultural traits have tangible value—and thus takes the form of capital.<sup>116</sup> All children are exposed to culture within the family unit, and no culture is superior to another in any absolute sense.<sup>117</sup> But in the U.S., the most

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<sup>109</sup> Adam Swift, *Justice, Luck, and the Family: The Intergenerational Transmission of Economic Advantage From a Normative Perspective*, in UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS 258 (Samuel Bowles, Herbert Gintis & Melissa Osborne Groves eds., 2005) (“The family is... a sphere within which partiality is not merely morally legitimate but morally required, perhaps one where impartial thinking is positively out of place.”).

<sup>110</sup> Most of us adhere to a “conventional” conception of equality of opportunity that accepts that some inequality, such as in the way parents choose to raise their children, is acceptable. There is, however, a “radical” view that “all inequalities due to differential luck [e.g. the family in which you were born] are unjust and give justice grounds for equalization.” *Id.* at 263.

<sup>111</sup> Samuel Bowles et al., *Introduction*, in UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS 21 (Samuel Bowles, Herbert Gintis & Melissa Osborne Groves eds., 2005).

<sup>112</sup> *Id.* See, also, Swift, *supra* note 109, at 272 (asserting that “we have reason to value and protect” the familial transmission of culture).

<sup>113</sup> Swift, *supra* note 109, at 274 (expressing concerns about the implications of genetic engineering).

<sup>114</sup> *Id.* at 256 (“the family hinders the attainment of equality of opportunity.”).

<sup>115</sup> JAY MACLEOD, AIN’T NO MAKIN’ IT: ASPIRATIONS & ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD 13 (1995).

<sup>116</sup> Bowles et al., *supra* note 111, at 19 (asserting that certain valuable traits, such as sense of personal efficacy and risk-taking, “covary with...wealth”).

<sup>117</sup> Value from a cultural capital perspective is not synonymous with inherent superiority or rectitude. In her study of class-based childrearing practices, Annette Lareau proffered that both of the cultures she encountered conferred “intrinsic benefits (and burdens) for parents and their children.” LAREAU, *supra* note 102, at 241.

valuable culture is based on white, middle-class values.<sup>118</sup> The extent of exposure to this culture is a proxy for merit.

For instance, within schools, the most “acculturated” students are better able to understand prevailing instructional methods, as they are based on the modes of interaction that take place within “cultured” homes.<sup>119</sup> A better understanding of teacher instructions leads to better grades and test scores, which in turn lead to better future opportunities.<sup>120</sup> On the other hand, those who come to school least “acculturated” often struggle with low grades and test scores, and thus develop low opinions of themselves and their academic abilities. These feelings in turn lead to negative experiences in school and fewer and less attractive future opportunities.

Bourdieu described this process as a “crude and ruthless affirmation of the power relationship” within which social hierarchies are converted to academic hierarchies, and a student’s level of dominant class acculturation is rewarded or sanctioned accordingly.<sup>121</sup> The lack of valuable culture goes beyond being a mere meritocratic disadvantage; it is an active hindrance.<sup>122</sup>

At first blush, the notion that genes provide certain advantages seems to comport neatly with the innate ability ideal of equality that is fundamental to our idea of meritocracy. Those with natural ability are supposed to ascend higher than those lacking such. But unfortunately, genes tend to confer benefits (and burdens) in ways that are antithetical to merit. While the close association between parent and child IQ is well-documented,<sup>123</sup> the genetic transmission of IQ is a “surprisingly unimportant” factor of economic success.<sup>124</sup> One study found that inherited IQ accounted for just

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<sup>118</sup> Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in POWER AND IDEOLOGY 496 (Jerome Karabel & Albert Henry Halsey eds., 1977).

<sup>119</sup> See, e.g., LAREAU, *supra* note 102 (asserting that the “concerted cultivation” childrearing practices favored by middle-class families are preferred by teachers over the “natural growth” practices favored by working-class and poor families).

<sup>120</sup> See, e.g., RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 24 (2005) (explaining how middle-class children have an easier time grasping inquiry style teaching methods than working-class children).

<sup>121</sup> Bourdieu, *supra* note 118, at 496.

<sup>122</sup> LAREAU, *supra* note 102, at 241 (“There are signs that some family cultural practices, notably those associated with [middle class culture], give children advantages that other cultural practices do not.”).

<sup>123</sup> Bowles et al., *supra* note 111, at 9 (noting that correlations have ranged from 0.42 to 0.72 in various studies).

<sup>124</sup> *Id.* at 4.

2% of the correlation between parent and child income.<sup>125</sup> However, physical genetic factors, such as skin color and facial features, wield much larger meritocratic influence,<sup>126</sup> even though they are decidedly un-meritocratic.

### A. *The Effects of Income and Wealth*

The extent to which a family can tip inequality of opportunity in favor of its children is determined overwhelmingly by monetary factors. As the SAT data shows, income status masquerades as merit. A higher SAT score will make a child appear smarter, when all the score might be showing is that the child's parents have more means of exposing her to tested material and relevant cultural norms. In this way, misuse of standardized tests essentially serves the same function as the old system of merit by birthright. But while the effects of income differences are often highlighted, it is wealth that has been described as “the buried fault line of the American social system.”<sup>127</sup> It is wealth, not income, which truly separates the haves and the have-nots.

Comedian Chris Rock provided the following apt illustration of the difference between being asset-wealthy and income-rich:

*Wealth is passed down from generation to generation; you can't get rid of wealth. Rich is some shit you could lose with a crazy summer and a drug habit.*<sup>128</sup>

Wealth “signifies the command over financial resources that a family has accumulated over its lifetime [and]...across generations.”<sup>129</sup> Its

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<sup>125</sup> *Id.* at 11.

<sup>126</sup> David J. Harding et al., *The Changing Effect of Family Background on the Incomes of American Adults*, in *UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS* 105 (Samuel Bowles, Herbert Gintis & Melissa Osborne Groves eds., 2005) (noting that American men whose physical traits suggest they are “of European descent” make more money than men with traits suggesting “African descent”). *See, also*, Sue Shellenbarger, *On the Job, Beauty Is More Than Skin-Deep*, *THE WALL STREET JOURNAL*, Oct. 27, 2011, <http://online.wsj.com/article/SB10001424052970203687504576655331418204842.html> (“Good-looking people charm interviewers, get hired faster, are more likely to make more sales and get more raises.”).

<sup>127</sup> *Id.* at 67.

<sup>128</sup> Youtube.com, Very Funny Chris Rock About Wealth, <http://www.youtube.com/watch?v=4m37JkkGjAY> (last visited on Dec. 26, 2012).

<sup>129</sup> OLIVER & SCHAPIRO, *supra* note 85, at 2 (asserting that wealth disparities expose “deep patterns of racial imbalance not visible when viewed only through the lens of income.”).



intergenerational nature makes disparities very difficult to correct. Inequalities are passed down, often gaining steam like runaway trains. So an individual's starting point not only affects his ending point, but also those of his descendants. Therefore, wealth status can be a sticky phenomenon and, given our history, is "imbued with the shadow of race."<sup>130</sup> A look at intergenerational income trends illustrates much about inequalities in wealth transmission.

About 44% of children born into the top income quartile will remain there as adults.<sup>131</sup> Similarly, about 47% of children born into the bottom quartile will remain there.<sup>132</sup> These persistence rates are remarkable, given that they take place at the extreme, and presumably more volatile, ends of the income strata. But the real story behind these trends becomes clear when they are broken down by race. About 32% of white children born into the bottom quartile will remain there through adulthood, compared to a whopping 63% of black children.<sup>133</sup> At the other end, while about 45% of white kids born into the top quartile will remain there; only about 15% of black kids will. So based on these statistics, a poor black child will likely grow to be a poor adult, and a rich black child will almost assuredly be a less rich adult.<sup>134</sup>

A compelling component of our meritocratic narrative is the "rags to riches" story—the poor genius ascending to the upper-class (or natural aristocracy) based on his talents and efforts. But a look at the data shows that while the odds of a white child ascending from the bottom quartile to the top are low (about 14%), the odds of a black child doing so are barely perceptible (less than 4%).<sup>135</sup> In fact, for black children, a "riches to rags" experience is almost ten times more likely than the converse.<sup>136</sup>

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*See, also, id., at 2* (distinguishing wealth, "what people own", from income, "a flow of money over time").

<sup>130</sup> OLIVER & SCHAPIRO, *supra* note 85, at 6.

<sup>131</sup> Tom Hertz, *The Intergenerational Economic Mobility of Black and White Families in the United States*, in *UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS* 182 (Samuel Bowles, Herbert Gintis & Melissa Osborne Groves eds., 2005).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> When incomes are adjusted for family size, income persistence among black children born into the top quartile increases to 37%, but the rate of persistence for black kids born in the bottom quartile remain above 60%. *Id.* at 183.

<sup>135</sup> *Id.* at 184.

<sup>136</sup> Thirty-five percent (35%) of black children born into the top income quartile will fall to the bottom quartile as adults, compared to less than 4% who will ascend from the bottom to the top. When incomes are adjusted for family size, about 19% of top quartile black children will fall to the bottom as adults, compared to 4% who will ascend. *Id.*

Wealth disparities are “products of the past,”<sup>137</sup> and the contemporary trends are, in a word, breathtaking. In 2009, the median net worth for white households was \$113,149, compared to a woeful \$5,677 for black households.<sup>138</sup> Put differently, the typical white family possesses 20 times greater wealth than the typical black family. This is the highest proportional difference since the Census Bureau began publishing such data in 1984.<sup>139</sup>

Research conducted by sociologists Melvin L. Oliver and Thomas M. Shapiro found that 63% of blacks had negative net worth, compared to 28% of whites.<sup>140</sup> At the other end, only 3% of blacks had net worth above \$50,000, compared to 24% of whites—an eight-fold difference.<sup>141</sup> At every phase of life, yawning gaps in wealth exist. Blacks younger than 36 possessed 6% of the wealth of whites of similar ages.<sup>142</sup> Between ages 36 and 64, blacks possessed 9% of white wealth, and above the age of 64, blacks possessed 20%.<sup>143</sup> Not even differences in job prestige can disturb these trends. Blacks in highly-skilled, professional jobs possessed only 18% of the wealth of similarly-situated whites;<sup>144</sup> but more surprisingly, professional blacks had less wealth than whites in low-skilled, blue collar jobs.<sup>145</sup>

To accept race-based disparities of this kind is to accept that we are on our way to achieving Young’s grand denouement—hereditary elitism—and blacks are simply taking up their rightful places at the bottom of the wealth hierarchy. That view, however, is unsupported.<sup>146</sup> Oliver and Shapiro found that only 29% of wealth disparities between whites and blacks are

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<sup>137</sup> OLIVER & SCHAPIRO, *supra* note 85, at 2.

<sup>138</sup> Whites possessed the highest net worth among all racial/ethnic groups. PAUL TAYLOR ET AL., PEW RESEARCH CENTER, WEALTH GAPS TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 13 (2011), *available at* [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf).

<sup>139</sup> *Id.* at 3.

<sup>140</sup> OLIVER & SCHAPIRO, *supra* note 85, at 102.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 198.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 119 (listing the median net worth of blacks employed in “upper-white-collar” jobs as \$12,303, compared to \$66,800 for similarly-employed whites).

<sup>145</sup> *Id.* (listing the median net worth of blacks employed in “upper-white-collar” jobs as \$12,303, compared to \$15,500 for whites employed in “lower-blue-collar” jobs).

<sup>146</sup> *See, e.g.,* Fallows, *supra* note 75 (explaining that differences in innate intelligence “do not explain the lockstep correlation between parental income and student scores”).

accounted for by differences in “human capital, sociological, and demographic factors.”<sup>147</sup> In other words, wealth disparities exist even among whites and blacks of similar education, years of work experience, and other factors that should hold meritocratic sway.

This finding prompted Oliver and Shapiro to conclude that “disparities in wealth between blacks and whites are not the product of haphazard events, inborn traits, isolated incidents, or solely contemporary individual accomplishments.”<sup>148</sup> Rather, they are the result of discrimination against black Americans, which, in the words of LBJ, has been of a “dark intensity...matched by no other prejudice in our society.”<sup>149</sup> Economist Richard Rothstein aptly argued:

*There is every reason to believe that the genetic potential within races is identical, or nearly so. Blacks did not become over-represented in the lower class of America because their genetic makeup was inferior, but because they were enslaved, then segregated and barred from equal opportunity for more than another century.*<sup>150</sup>

This view is contrary to the commonly held belief that “black poverty [is] not the product of decades of systematic legal repression so much as a deficiency of talent and ambition.”<sup>151</sup>

#### IV: CAUSES OF INEQUALITY

In understanding the nature of inequality, it is important to understand its root causes. President Lyndon Johnson rightly acknowledged that disparities between black and white citizens “are solely and simply the consequence of ancient brutality, past injustice, and present prejudice.”<sup>152</sup> From the moment the first Africans stepped ashore in August 1619 in colonial Jamestown, the history of black America as well as the history of

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<sup>147</sup> These factors pertain to education, job prestige, and career mobility. OLIVER & SCHAPIRO, *supra* note 85, at 169.

<sup>148</sup> *Id.* at 12.

<sup>149</sup> KATZNELSON, *supra* note 98, at 178.

<sup>150</sup> ROTHSTEIN, *supra* note 120, at 17.

<sup>151</sup> ANDERS WALKER, *THE GHOST OF JIM CROW* 91 (2009) (describing this view as “the casual manner in which most white southerners perceived the black plight”).

<sup>152</sup> KATZNELSON, *supra* note 98, at 177. *See, also*, OLIVER & SCHAPIRO, *supra* note 85, at 4 (“racialization of state policy...from the beginning of slavery throughout American history.”)

black injustice in America began.<sup>153</sup> This article makes no attempt to retell the history of the last four centuries, but it will discuss how differential access to social services, education, employment, housing, and of course basic freedom worked to disadvantage black Americans in ways that manifest today.

On December 5, 1946, President Harry Truman issued an executive order establishing the President's Committee on Civil Rights. The committee's objective was to recommend ways of ensuring that civil rights for all citizens were protected.<sup>154</sup> In his charge, Truman lamented that "freedom from fear" was under attack, and such state of affairs was "subversive of our democratic system."<sup>155</sup>

Truman was right to be concerned. The committee's report documented heinous acts of police brutality, mob rule, and broad disenfranchisement against citizens of all races, but especially blacks in the South. In a section titled "Signs of Recent Progress," the committee noted the declining number of lynchings, but then acknowledged that "there has not yet been a year in which America has been completely free of the crime of lynching."<sup>156</sup> Moreover, the perpetrators of these acts were often aided by police and granted "almost complete immunity from punishment," thereby, adding to feelings of hopelessness and dread among the black population.<sup>157</sup> Even J. Edgar Hoover, a man who harbored his own antipathy toward blacks, testified that "unbelievable" arrogance among whites and "almost unbelievable" fear among blacks often thwarted FBI investigations into lynchings.<sup>158</sup>

The committee highlighted that even though universal suffrage was the law of the land, there were many "backwaters in our political life" where the

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<sup>153</sup> See, e.g., LERONE BENNETT, *BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA* 29 (1982).

<sup>154</sup> PRESIDENT'S COMM. ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS VII* (1947), <http://www.trumanlibrary.org/civilrights/srights1.htm#VII> (directing the committee to make "recommendations with respect to the adoption or establishment by legislation or otherwise of...procedures for the protection of the civil rights.") (follow links to relevant sections) [hereinafter CIVIL RIGHTS REPORT].

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 20.

<sup>157</sup> *Id.* at 24 ("Lynching is the ultimate threat by which his inferior status is driven home to the Negro. As a terrorist device, it reinforces all the other disabilities placed upon him.").

<sup>158</sup> *Id.*

right to vote did not apply equally.<sup>159</sup> The committee elaborated, “The denial of suffrage on account of race is the most serious present interference with the right to vote.”<sup>160</sup> Throughout the South, black Americans were being disenfranchised in ways that were both effective and adaptive.<sup>161</sup> Some of the most common tactics were the white primary,<sup>162</sup> the poll tax,<sup>163</sup> tests of constitutional knowledge,<sup>164</sup> and of course “terror and intimidation.”<sup>165</sup> These tactics greatly depressed voter participation. For example, in the 1944 Presidential election, voter participation was 10% in poll tax states and almost 50% in non-poll tax states.<sup>166</sup> Even though the committee observed that blacks were “beginning to exercise the political rights of free Americans,” this trend was nonetheless “limited and precarious.”<sup>167</sup>

This climate of terror and disenfranchisement was an extension of the status quo—one in which black Americans were considered unworthy of the constitutional freedoms and everyday protections afforded white citizens. Equality of opportunity did not exist because equality of freedom did not exist. And it was within this climate that the stage was set for New Deal-era economic and social programs to widen the disparities between blacks and whites in ways that are still apparent today.<sup>168</sup>

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<sup>159</sup> *Id.* at 35.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (“As legal devices for disfranchising the Negro have been held unconstitutional, new methods have been improvised to take their places.”).

<sup>162</sup> The white primary was used in Southern states to disenfranchise black citizens by restricting the Democratic primary only to whites. Because of the virtual one-party rule of the Democrat Party in these states, the general election, in which some blacks voted, was inconsequential. *Id.* at 36.

<sup>163</sup> *Id.* at 39 (describing the poll tax as “an anti-Negro device”).

<sup>164</sup> *Id.* at 37 (discussed how these tests required voters to explain provisions of the state constitution, but the results were frequently ignored in cases of whites who failed or blacks who passed).

<sup>165</sup> *Id.* (providing the following veiled threat from the governor of South Carolina in response to the white primary being deemed unconstitutional by the Supreme Court in 1944: “White supremacy will be maintained in our primaries; let the chips fall where they may.”).

<sup>166</sup> Additionally, in the 1946 congressional elections, 5% of voters in poll-tax states participated, compared to a third of voters in non-poll tax states. *Id.* at 39.

<sup>167</sup> *Id.* at 35.

<sup>168</sup> KATZNELSON, *supra* note 98, at xi (“National policies in the 1930s and 1940s [contributed to] deep, even chronic dispossession that continues to afflict a large percentage of black America.”).

*A. New Deal Discrimination*

The New Deal is heralded as helping usher in an era of unprecedented prosperity. Many of the laws promulgated during the era are credited with aiding the emergence of a robust American middle-class. Unfortunately, the ardent desire of Southern congressmen to uphold Jim Crow, combined with Northern indifference to race relations in the South,<sup>169</sup> ensured that the middle-class engendered by the New Deal was composed “almost exclusively” of whites.<sup>170</sup> In short, the New Deal was a comprehensive, legislatively authorized, and publicly-supported affirmative action program for whites. It allowed white Americans to progress with full political and economic support, largely at the expense of black Americans, who for decades were virtually shut out of the era’s most generous social programs.<sup>171</sup>

During the New Deal-era, Congress was dominated by legislators from the seventeen Jim Crow states—not necessarily in number, but definitely in influence and power.<sup>172</sup> These legislators were uniformly committed to preserving “the southern way of life”—the legal segregation of the races, typified by the political, economic, and social subjugation of black citizens.<sup>173</sup> Their influence and power in Congress were directly related to the disenfranchisement taking place at home. Because blacks were unable to influence, or even participate in, Southern elections, Southern states were exclusively represented by Democratic politicians whose central objective was to preserve Jim Crow. Moreover, because blacks were counted for purposes of proportional representation in the House, the influence of these politicians was disproportionate, relative to the interests they served.<sup>174</sup>

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<sup>169</sup> WALKER, *supra* note 151, at 15 (acknowledging that de facto segregation was common in many Northern cities and that “white Americans in the North and West were not as liberal on racial issues as many believed”).

<sup>170</sup> KATZNELSON, *supra* note 98, at 114

<sup>171</sup> *Id.* at 18 (“The exclusion of so many black Americans from the bounty of public policy, and the way in which these important, large-scale, national programs were managed, launched new and potent sources of racial inequality.”).

<sup>172</sup> *Id.* at 17 (“The Southern wing of the Democratic Party was in a position to dictate the contours of Social Security, key labor legislation, the GI Bill, and other landmark laws.”)

<sup>173</sup> *Id.* at 17. *See, also*, WALKER, *supra* note 151, at 19 (pointing out that some Southern politicians argued that segregation was good for blacks because it allowed them to “improve their lives free from white interference and control”).

<sup>174</sup> *Id.* at 51 (“Since blacks counted in the numbers reported by the census, their large presence combined with their frequent inability to vote allowed white citizens to gain representation in higher proportions than their population in the House of Representatives.”)

Perversely, they could use the presence of blacks in their states as a tool of oppressing those same blacks.

Social Security and the GI Bill are two of the most celebrated pieces of New Deal legislation. Signed into law in 1935, the Social Security Act provided a safety net, unprecedented at the time, which is still credited for keeping millions of seniors out of poverty.<sup>175</sup> The GI Bill is credited with “democratizing access to education, diffusing skills, enhancing ownership, placing veterans in good jobs, and promoting geographic as well as occupational mobility.”<sup>176</sup> These laws changed America—though sadly in unequal ways.

By the time the contours of the Social Security Act and the GI Bill were being hammered out, the Southern congressional delegation had succeeded in making the preservation of Jim Crow the *de facto* “center of Washington’s politics and policymaking.”<sup>177</sup> Their exaggerated seniority, a benefit of the absence of a viable Republican Party in the South, meant that Southern congressmen chaired a disproportionate number of important committees.<sup>178</sup> Moreover, their hyper-willingness to use the filibuster as a bill-killing mechanism in the Senate meant that the support of the Southern delegation was vital for most any bill to advance.<sup>179</sup> The result of this influence and power was that major New Deal legislation was “crafted and administered in a deeply discriminatory manner.”<sup>180</sup> The Southern way of life—Jim Crow—could not be disturbed.

Racial discrimination was never explicitly written into the laws promulgated as part of the New Deal.<sup>181</sup> But the Jim Crow faction of Congress had two primary mechanisms that ensured the laws would be

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<sup>175</sup> Social Security, Social Security History: Fifty Years Ago, <http://www.ssa.gov/history/50ed.html> [Hereinafter Social Security History] (last visited Dec. 26, 2012).

(“If any piece of social legislation can be called historic or revolutionary, in breaking with the past and in terms of long run impact, it is the Social Security Act.”).

<sup>176</sup> KATZNELSON, *supra* note 98, at 117.

<sup>177</sup> *Id.* at 20. *See, also*, WALKER, *supra* note 151, at 16 (discussing how remaining on “at least moderately good [political] terms” with their more liberal Northern colleagues was a tactic used by Southerners to maintain outsized influence).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* *See, also*, WALKER, *supra* note 151, at 130 (explaining how “southern recalcitrance” combined with insufficient national interest contributed to federal passivity on civil rights well into the 1960s).

<sup>180</sup> KATZNELSON, *supra* note 98, at 17.

<sup>181</sup> *See, e.g.*, CIVIL RIGHTS REPORT, *supra* note 154, at 75.

applied unequally: 1) they restricted benefits in ways that would disproportionately disqualify blacks; and 2) they gave local officials power to administer programs in discriminatory fashion.<sup>182</sup>

### 1. Social Security

Social Security provides the most glaring example of how a statute could be applied in a non-discriminatory way while concurrently fulfilling discriminatory intent. In 1934, President Franklin Delano Roosevelt formed his Committee on Economic Security to devise a “sound means...to provide at once security against several of the great disturbing factors in life—especially those which relate to unemployment and old age.”<sup>183</sup> The country was in the throes of the Great Depression, with unimaginably high unemployment and gripping poverty. These trends were particularly acute for blacks. The collapse hollowed-out jobs not only in the Southern agricultural sector in which most blacks were employed,<sup>184</sup> but also in the Northern manufacturing sector that aided the escape, if you will, of blacks who fled the South.<sup>185</sup> So the safety net that Roosevelt envisioned held great potential for benefitting all Americans, especially black Americans.

In just six months, the Committee drafted a report that would serve as “the basic blueprint” for the Social Security Act.<sup>186</sup> In its report, the Committee stated, “We are opposed to exclusions of any specified industries” in the provision of benefits.<sup>187</sup> This recommendation, however, went unheeded in the final law. The Southern delegation insisted that workers employed in agricultural or domestic sector jobs be excluded from receiving unemployment, old-age, and survivor benefits.<sup>188</sup> These exclusions ended up disqualifying 65% of black workers, compared to 40% of white

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<sup>182</sup> KATZNELSON, *supra* note 98, at 22.

<sup>183</sup> Social Security History, *supra* note 175.

<sup>184</sup> KATZNELSON, *supra* note 98, at 32 (detailing the decline of cotton revenue from \$1.4 billion in 1929 to \$550 million in 1939).

<sup>185</sup> *Id.* at 13 (“The ruinous economy in the 1930s also closed off the option that earlier had opened as a result of the robust demand for labor in the North.”).

<sup>186</sup> Social Security History, *supra* note 175.

<sup>187</sup> *Id.*

<sup>188</sup> CIVIL RIGHTS REPORT, *supra* note 154, at 75 (characterizing this exclusion as inadvertent). *But, see*, KATZNELSON, *supra* note 98, at 43 (noting the intentional nature of the exclusions and how they were lifted in 1954 “after southern Democrats finally lost their ability to mold legislation”).



workers.<sup>189</sup> So even though the law was non-discriminatory on its face, it still had the effect of excluding the vast majority black workers.

The motivation behind these exclusions was not prudent policymaking, but a desire to preserve Jim Crow. Southern congressmen believed that federal assistance could weaken the oppressive hold that Southern planters and well-to-do families had on their low-wage agricultural and domestic charges. In essence, a “direct relationship with federal relief” was seen as a threat to the unequal relationship between the races.<sup>190</sup> Therefore, those most in need of assistance—the poorest of the poor—remained exposed to crippling adversity and subject to wages that were only a theoretical step up from enslavement.<sup>191</sup>

Local control and administration of New Deal-era programs was another Southern must-have. Unlike the subtle, though debilitating, discrimination of exclusionary policies, local control discrimination was barefaced and unapologetic. It was allowed to take place unabated by the absence of antidiscrimination policies in the statutes.<sup>192</sup> Local control policies were effective because they separated the funding source from the spending decisions.<sup>193</sup> Local administrators were granted broad discretion to disburse federal funds in a way that preserved economic and social relationships of the South.<sup>194</sup> As a result, Social Security aid payments were kept low enough to keep workers beholden to oppressive employers, and they were differentiated, to preserve inequality between the races.<sup>195</sup>

## 2. GI Bill

But it is the disbursal of GI Bill benefits that provides a compelling illustration of the discriminatory effects of local control. Like the Social

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<sup>189</sup> CIVIL RIGHTS REPORT, *supra* note 154, at 75.

<sup>190</sup> KATZNELSON, *supra* note 98, at 38.

<sup>191</sup> See, e.g., *id.* (describing black domestic workers, most often females, as the “most exploited group of workers in the country,” given their salaries of \$5 or less for a 70-hour work week).

<sup>192</sup> *Id.* at 23 (“[Southern congressmen] prevented Congress from attaching any sort of anti-discrimination provisions to...the [social welfare] programs that distributed monies to their region.”).

<sup>193</sup> *Id.* at 40.

<sup>194</sup> *Id.* at 30.

<sup>195</sup> *Id.* at 59 (“By setting a floor on wages, it necessarily would have leveling effects that would cut across racial lines in the lowest wage sectors of the South, where there existed wide wage disparities between African American and white wage workers.”).

Security Act, the GI Bill was written in a non-discriminatory way. All veterans who served 90 days or more and had not received a dishonorable discharge were eligible to receive benefits.<sup>196</sup> The law, however, was designed to uphold Jim Crow.<sup>197</sup> The local control mechanisms assured no “modicum of equality” in the provision of benefits.<sup>198</sup> As a result, black veterans were often thwarted in their attempts to secure the housing and educational benefits written into the act.

The homeownership provisions of the GI Bill were among the most significant. Homeownership was the “key foundation of economic security” for the emerging American middle-class.<sup>199</sup> Black veterans, however, found it difficult to secure home loans through the supposedly non-discriminatory GI Bill. The local control provisions dictated that the loans would be made not by the federal government, but by private lenders; the feds would act merely as a guarantor.<sup>200</sup> As a result, the vast majority of black vets saw their loan applications denied, often for “nakedly racist reasons.”<sup>201</sup> In 1947, *Ebony* magazine conducted a study of home, business, and farm loans made through the GI Bill in thirteen Mississippi cities and found that out of 3,229 loans, only five went to black veterans.<sup>202</sup> Another study found that in New York City and northern New Jersey, only 100 out of 67,000 GI Bill-guaranteed mortgages went to non-whites.<sup>203</sup>

Similarly, education benefits were meted out in sharply discriminatory fashion. For starters, segregation laws and unstated discriminatory policies made it difficult for black veterans to find colleges with available space.<sup>204</sup> Historically black institutions, whose mission “grew out of racially discriminatory policies in education,” were essentially the only option for black veterans who wanted to attend college.<sup>205</sup> Options to attend white

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<sup>196</sup> *Id.* at 118 (“Irrespective of region, class, ethnicity, and race, all veterans were equally recognized as entitled to the bounty of social rights.”)

<sup>197</sup> *Id.* at 114.

<sup>198</sup> *Id.* at 138.

<sup>199</sup> *Id.* at 116.

<sup>200</sup> CIVIL RIGHTS REPORT, *supra* note 154, at 68 (describing how without loan approval from a private bank “there is no possibility of taking advantage of the GI Bill of Rights”).

<sup>201</sup> KATZNELSON, *supra* note 98, at 139 (noting that private lenders often had policies dictating that “no Negro veteran is eligible for a loan”).

<sup>202</sup> *Id.* at 140.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 129.

<sup>205</sup> THE U.S. COMM’N ON CIVIL RIGHTS, THE EDUCATIONAL EFFECTIVENESS OF HISTORICALLY BLACKS COLLEGES AND UNIVERSITIES 11 (2010), [http://www.usccr.gov/pubs/HBCU\\_webversion2.pdf](http://www.usccr.gov/pubs/HBCU_webversion2.pdf) (explaining that historically black

institutions were limited in the North and virtually non-existent in the South.<sup>206</sup> Indeed, in the South, the mere expression of a desire, as a black person, to attend a white university was dangerous—and the actual attempt to do so was fraught with deadly risks.<sup>207</sup> Historically black institutions, however, suffered from inadequate and inequitable funding<sup>208</sup> and acute space limitations,<sup>209</sup> which resulted in their inability to accommodate the increased demand for seats. As a result, about twenty-thousand black veterans were turned away from these schools.<sup>210</sup> Overall, only 12% of black veterans enrolled in college, compared to 28% of white veterans.<sup>211</sup>

Pathways into agricultural training programs, an alternative to college, were largely blocked to black veterans. These programs paid relatively high wages, and local administrators feared that black veterans would use the training to acquire and run their own farms.<sup>212</sup> Of the 28,000 veterans who received this government-funded training in the South, only 11% were black,<sup>213</sup> an illogical proportion given the number of blacks working in agriculture and living in the South. Restricted and closed pathways often funneled black veterans into inadequate colleges, or into sham schools that provided “little or no actual training,” or away from higher education completely.<sup>214</sup> Either way, black veterans were unable to take advantage of GI Bill benefits to the same extent as white veterans.

Political scientist Ira Katznelson described the effect of the discriminatory administration of the GI Bill in heartbreaking fashion:

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colleges and universities, also known as HBCUs, are institutions “that existed before 1964, with a historic and contemporary mission of educating blacks while being open to all” [hereinafter COMM’N ON CIVIL RIGHTS].

<sup>206</sup> See, e.g., KATZNELSON, *supra* note 98, at 130` (explaining that there were a few white institutions in the North that offered admissions to blacks, but virtually none in the South).

<sup>207</sup> See, e.g., FRANK LAMBERT, *THE BATTLE OF OLE MISS* (2010) (chronicling the experiences of James Meredith and others in their attempts to integrate the University of Mississippi).

<sup>208</sup> COMM’N ON CIVIL RIGHTS, *supra* note 205, at 25 (discussing how Southern and Border States treated “HBCUs unequally vis-à-vis traditionally white institutions in a number of areas, including resource allocation”).

<sup>209</sup> KATZNELSON, *supra* note 98, at 131.

<sup>210</sup> *Id.* at 131 (noting a survey of 21 black colleges that found 55% of applicants were turned away due to space issues, compared to 28% overall).

<sup>211</sup> *Id.* at 134.

<sup>212</sup> *Id.* at 135.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 137.

*The way in which the [GI Bill] and its programs were organized and administered, and its ready accommodation to the larger discriminatory context within which it was embedded, produced practices that were more racially distinct and arguably more cruel than any other New Deal-era program. The performance of the GI Bill mocked the promise of fair treatment. The differential treatment meted out to African Americans sharply curtailed the statute's powerful egalitarian promise and significantly widened the country's large racial gap. Any celebration of postwar gains for veterans must reckon with these doleful practices and legacies.”<sup>215</sup>*

In many ways, Jim Crow was the worst form of affirmative action—an arrantly base imposition of preferences. Moreover, its preposterous inefficiency,<sup>216</sup> particularly given the South's precarious financial condition, would be comical were it not so ruinous. A former federal official remarked, in 1935, that the way blacks were treated under the New Deal was “a disgrace that [stunk] to heaven.”<sup>217</sup> Decades later, the stench is still wafting.

### *B. Housing Discrimination*

The centerpiece of wealth accumulation in America has been homeownership. Equity in homes and other forms of real estate have provided a means for families to fund their children's education, start businesses, and acquire political clout.<sup>218</sup> Therefore, unequal access to homeownership has fostered inequities in other areas of life.

The effects of GI Bill discrimination became most apparent in the 1980s when the bulk of the mortgages taken out during the era matured. In 1984, almost 70% of white families owned homes, and the average value was \$52,000.<sup>219</sup> On the other hand, only about 40% of blacks owned homes, with an average value of about \$30,000.<sup>220</sup> Thus, a far lower proportion of GI Bill-era blacks owned homes, and these homes were significantly less

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<sup>215</sup> *Id.* at 140.

<sup>216</sup> *See, e.g.,* CIVIL RIGHTS REPORT, *supra* note 154, at 65 (“The cost of maintaining separate, but truly equal, school systems would seem to be utterly prohibitive in many of the southern states.”).

<sup>217</sup> KATZNELSON, *supra* note 98, at 41 (quoting Forrester Washington, former director of Negro Affairs for the Federal Emergency Relief Administration).

<sup>218</sup> OLIVER & SCHAPIRO, *supra* note 85, at 22.

<sup>219</sup> KATZNELSON, *supra* note 98, at 164.

<sup>220</sup> *Id.*

valuable on average. This proverbial double-whammy was the main reason why in 1984, blacks held only 9% of the wealth of whites<sup>221</sup>—a paltry amount, though much higher than today’s 5% proportion.<sup>222</sup>

Housing discrimination has always been a potent tactic used to retard and suspend the social and economic advancement of blacks. Truman’s Committee on Civil Rights asserted that black families faced a “double barrier” in seeking housing. Like everyone, these families had to contend with post-WWII housing shortages, but unlike “white gentiles,” they also had to endure discrimination.<sup>223</sup> The restrictive covenant was a particularly effective tool.<sup>224</sup> These legal instruments would bind property owners into agreements not to sell or lease property to individuals deemed “undesirable,” including of course members of various racial and ethnic groups.<sup>225</sup>

Truman’s committee found restrictive covenants to be prevalent throughout the country, particularly in major cities in the North and West.<sup>226</sup> In Chicago alone, 80% of the land was covered by racial restrictive covenants.<sup>227</sup> These instruments were legally binding until 1948, when the Supreme Court deemed their enforcement unconstitutional.<sup>228</sup> Discriminatory housing practices were successful at keeping blacks isolated in “crowded slum areas,” prompting the Truman committee to call them among society’s “most challenging problems.”<sup>229</sup> The process of suburbanization is a prime example of how unequal access to housing has negatively affected blacks.

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<sup>221</sup> *Id.* (listing the median net worth of white households as \$39,135, compared to \$3,397 for black households).

<sup>222</sup> TAYLOR ET AL., *supra* note 138, at 14.

<sup>223</sup> CIVIL RIGHTS REPORT, *supra* note 154, at 67 (explaining that in addition to race and color, housing discrimination was based on religion and national origin).

<sup>224</sup> *Id.* at 68 (“the restrictive covenant has become the most effective modern method of accomplishing such segregation.”).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* See, also, EDWARD GLAESER & JACOB VIGDOR, MANHATTAN INSTITUTE, THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA’S NEIGHBORHOODS, 1890-2010 5 (2011), available at [http://www.manhattan-institute.org/pdf/cr\\_66.pdf](http://www.manhattan-institute.org/pdf/cr_66.pdf) (finding that Chicago was the third most segregated city in 2010).

<sup>228</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (“In granting judicial enforcement of the restrictive agreements...the States have denied petitioners the equal protection of the laws.”).

<sup>229</sup> CIVIL RIGHTS REPORT, *supra* note 154, at 69.

The New Deal-era saw heightened migration out of central cities to new housing developments on the outskirts of town. This migration was encouraged by the federal government in three ways: 1) individual tax incentives that encouraged the acquisition of single-family homes, coupled with business tax incentives that encouraged the relocation of jobs to outlying communities;<sup>230</sup> 2) the building of roads and the provision of aid to the auto industry that fostered easier travel;<sup>231</sup> and 3) the advent of federally-backed mortgages that required only small down payments.<sup>232</sup> The federal government wanted to bolster the economy by fostering housing starts, and much untapped land lay just outside the central cities.<sup>233</sup>

More than 35 million families took advantage of this federal encouragement between 1933 and 1978, but to unequal extents and unequal results. For much of this time period, it was both federal and private sector policy to promote segregated neighborhoods.<sup>234</sup> These efforts adhered to “a national code of real estate ethics that endorsed the view that all-black and racially mixed neighborhoods were inferior to all-white homogeneous neighborhoods.”<sup>235</sup> Until 1950, the government encouraged the use of restrictive covenants to preserve the segregative character of suburban neighborhoods.<sup>236</sup>

Even after restrictive covenants were deemed unconstitutional, the government and private actors used other means to preserve the racial make-up of neighborhoods and to restrict movement of black families.<sup>237</sup>

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<sup>230</sup> OLIVER & SCHAPIRO, *supra* note 85, at 16.

<sup>231</sup> *Id.* at 16.

<sup>232</sup> *Id.* at 17.

<sup>233</sup> *Id.*

<sup>234</sup> Charles T. Clotfelter, *The Implications of “Resegregation” for Judiciary Imposed School Segregation*, 31 VAND. L. REV. 829, 838 (1978) (“FHA practices favoring low density dwelling and avoiding racially mixed neighborhoods in making loans...have fostered both economic and racial residential segregation.”). *See, also, id.* (“Outright discrimination by loan institutions, real estate brokers, and homeowners strengthens segregated patterns.”).

<sup>235</sup> Kevin Fox Gotham, *Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri*, 34 AM. STUDIES. 13 (2010).

<https://journals.ku.edu/index.php/amerstud/article/viewFile/3050/3009>.

<sup>236</sup> OLIVER & SCHAPIRO, *supra* note 85, at 18.

<sup>237</sup> *Id.* at 18. *See, e.g.,* Gotham, *supra* note 235, at 18 (describing how blockbusting, or the practice of moving blacks into an all-white neighborhood and then stoking fears of “impending racial turnover and property devaluation” among whites in order to secure their property at depressed prices, served to encourage segregation in Kansas City.)

Between 1950 and 1974, the proportion of whites who lived in central cities fell from 55% to 38%; the black proportion remained constant at about 75%.<sup>238</sup> The publicly-subsidized goldmine that was suburban homeownership was mostly unavailable to blacks. Moreover, federal policies isolated blacks in the inner cities at a point when these same policies were encouraging the relocation of jobs to the suburbs, further “deepening [the] ghettoization of the black population.”<sup>239</sup>

Sadly, housing discrimination remains a problem today. In July 2012, Wells-Fargo agreed to pay \$175 million to settle claims that it steered black and Latino borrowers into subprime and high-cost mortgages.<sup>240</sup> Blacks were four times more likely to be offered subprime loans than similarly-qualified white applicants; Latinos were three times more likely.<sup>241</sup> Additionally, blacks and Latinos who got prime loans nonetheless paid higher fees—an extra \$2,064 for blacks on a \$300,000 loan and an extra \$1,251 for Latinos.<sup>242</sup> A Department of Justice lawyer termed these higher fees a “racial surtax.”<sup>243</sup> In December 2011, Bank of America agreed to pay a record \$335 million to settle similar claims.<sup>244</sup>

The Wells Fargo and Bank of America settlements are mere tips of the iceberg of the scourge of housing discrimination.<sup>245</sup> The systematic steering of blacks into subprime loans and into properties with little prospect of appreciation played a major role in the post-recession widening of the white/black wealth disparity.<sup>246</sup> In 2009, 35% of black homeowners

<sup>238</sup> Clotfelter, *supra* note 234, at 836.

<sup>239</sup> OLIVER & SCHAPIRO, *supra* note 85, at 18. See, also, *id.* at 15 (associating “The Suburbanization of America” with “The Making of the Ghetto”).

<sup>240</sup> Ylan Q. Mui, *Wells Fargo, Justice Department Settle Discrimination Case for \$175 Million*, WASH. POST, Jul. 12, 2012, [http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for-175-million/2012/07/12/gJQAX66ZgW\\_story.html](http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for-175-million/2012/07/12/gJQAX66ZgW_story.html).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Charlie Savage, *Countrywide Will Settle a Bias Suit*, N.Y. TIMES, Dec. 21, 2011, <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html/>.

<sup>245</sup> U.S. Dep’t of Just., Housing and Civil Enforcement Cases, <http://www.justice.gov/crt/about/hce/caselist.php> (providing links to court documents relating to discrimination cases being pursued by the Housing and Civil Enforcement Section of the Department of Justice).

<sup>246</sup> See, e.g., TAYLOR ET AL., *supra* note 138, at 13 (discussing the extent to which declines in home equity resulted in steep declines in household wealth among Hispanic, black, and Asian households).

had zero or negative equity in their homes, compared to just 15% of white homeowners.<sup>247</sup>

### *C. Unequal Access to Schooling*

Wealth acquisition is tied to access to quality schooling. The local nature of education funding means that higher-value homes tend to be located in better-funded, and often higher-performing, school districts.<sup>248</sup> Moreover, the command over resources concomitant with wealth allows families to invest financially in education for their children, whether it is private K12 education or higher education. A Pew study concluded that for every \$35,000 of home equity, the college enrollment rate increases by 5%.<sup>249</sup> These trends are even more profound among middle- and low-income families. For families with income below \$70,000 and no equity in their home, the college-going rate is 9%.<sup>250</sup> That rate, however, increases more than three-fold to 29% with \$35,000 in equity and to 94% with \$150,000 in equity.<sup>251</sup> For these families, the college enrollment rate increases 6% for every additional \$10,000 of home equity.<sup>252</sup> Once again, wealth matters in ways that mimic merit, and the nature of wealth inequality ensures that race matters as well.

Throughout much of American history, blacks have been denied adequate access to education—originally by law and later by practice. A central tenet of the enslavement of Africans in the U.S. was the “containment and

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<sup>247</sup> *Id.* at 16 (listing the percentage of Latinos with zero or negative home equity as 31%).

<sup>248</sup> *See, e.g.,* RUTH HEUER & STEPHANIE STULLICH, OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT POLICY AND PROGRAM STUDIES SERVICE, U.S. DEPT. OF EDUC., COMPARABILITY OF STATE AND LOCAL EXPENDITURES AMONG SCHOOL WITHIN DISTRICTS: A REPORT FROM THE STUDY OF SCHOOL-LEVEL EXPENDITURES, at 18 (2011), <http://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf> (concluding that “more than 40 percent of Title I schools had lower personnel expenditures per pupil than did non-Title I schools at the same school grade level”).

<sup>249</sup> MICHAEL LOVENHEIM ET AL., THE PEW CHARITABLE TRUSTS, HOUSING WEALTH AND HIGHER EDUCATION: BUILDING A FOUNDATION FOR ECONOMIC MOBILITY 14 (2011), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Pew\\_EMPPProject\\_FamilyWealth.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Pew_EMPPProject_FamilyWealth.pdf).

<sup>250</sup> *Id.* at 16.

<sup>251</sup> *Id.* (noting that there are few families in the latter, low-income/high-home equity, group).

<sup>252</sup> *Id.*



repression of literate culture.”<sup>253</sup> Hiding behind false notions of black inferiority, Southern planters recognized the threat that hordes of literate enslaved Africans would pose to the Southern economy and the “peculiar institution” itself.<sup>254</sup> Education is power and thus a “contradiction of oppression.”<sup>255</sup> Enslaved Africans who learned to read and write in defiance of their masters were considered “rebel literates.”<sup>256</sup> It should be no surprise that the act of teaching blacks, enslaved or free, to read and write was criminalized throughout the South.<sup>257</sup>

This climate of deprivation did not, however, dampen the desire of enslaved Africans to be educated. By 1860, upwards of 5% of those enslaved were literate, truly an admirable number given the restrictions and threats they faced.<sup>258</sup> Additionally, after the end of their enslavement, blacks continued their “tradition of educational self-help” and even pushed for publicly-funded education.<sup>259</sup> The very notion of universal public education in the South was a distinctively black idea.<sup>260</sup> Poor Southern whites did not begin demanding public education until the late 19<sup>th</sup> century, more than twenty years after blacks had pushed for such accommodation.<sup>261</sup>

Sadly, it would be well into the 20<sup>th</sup> century before blacks would receive anything other than severely restricted access to public schooling in the South.<sup>262</sup> In 1933, only 18% of blacks were enrolled in high school in the Southern states, compared to 54% of whites.<sup>263</sup> In Mississippi, 7% of high school age blacks attended school, compared to 66% of whites.<sup>264</sup> The

<sup>253</sup> JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935* 1 (1988).

<sup>254</sup> See, e.g., WILLIAM H. WATKINS, *THE WHITE ARCHITECTS OF BLACK EDUCATION: IDEOLOGY AND POWER IN AMERICA, 1865-1954* 12 (2001) (“Education was anathema to the interests of keepers of chattel slaves.”). See, generally, Independence Hall Association in Philadelphia, U.S. History: Pre-Columbian to the New Millennium: 27 Peculiar Institution, <http://www.ushistory.org/us/27.asp> (“The ‘peculiar institution’ is slavery.”).

<sup>255</sup> ANDERSON, *supra* note 253, at 17 (“Former slaves were the first among native southerners to...campaign for universal, state-supported public education.”).

<sup>256</sup> *Id.*

<sup>257</sup> See e.g. <http://academic.udayton.edu/race/02rights/slavelaw.htm#11> (stipulating that such actions “shall be punishable by fine and whipping, or fine or whipping”).

<sup>258</sup> ANDERSON, *supra* note 253, at 16.

<sup>259</sup> *Id.* at 18.

<sup>260</sup> *Id.* at 4.

<sup>261</sup> See e.g., *id.* at 19 (explaining how black politicians used the Military Reconstruction Acts, passed in 1867, to use “southern constitutional conventions to legalize public education in the...former Confederate states.”).

<sup>262</sup> *Id.* at 148.

<sup>263</sup> *Id.* at 236.

<sup>264</sup> *Id.*

disparities were less stark at the elementary and middle school levels,<sup>265</sup> eventually reaching parity by 1940.<sup>266</sup> But even this statistical parity could not shield the inescapable fact that black public education looked very different than the white version. The Truman committee's report sums it up well:

*There is a marked difference in quality between the educational opportunities offered white children and Negro children in the separate schools. Whatever test is used—expenditure per pupil, teacher's salaries, the number of pupils per teacher, transportation of students, adequacy of school buildings and educational equipment, length of school term, extent of curriculum—Negro students are invariably at a disadvantage.*<sup>267</sup>

The educational accommodations afforded blacks in the South were motivated mostly by the planters' desire to preserve their low-wage workforce by stemming black migration out of rural areas.<sup>268</sup> Equal accommodations between the races—the guiding *farce* of “separate but equal”—was neither the goal nor the result. And this inequality “seriously affected the long-term development of education in the black community.”<sup>269</sup>

The unyielding achievement gaps we see between the races are an enduring legacy of past inequity. The National Assessment of Educational Progress (NAEP)<sup>270</sup> captures the nature of race-based achievement gaps. White students scored higher than black students at every relevant grade level (4<sup>th</sup>, 8<sup>th</sup>, and 12<sup>th</sup>) and across the reading, math, and science assessments. In

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<sup>265</sup> In 1900, 22% of southern black children age 5 to 9 attended school, compared to 37% of white children. Among children age 10 to 14, 52% of black children were enrolled, compared to 76% of white children. *Id.* at 151.

<sup>266</sup> *Id.* at 182.

<sup>267</sup> CIVIL RIGHTS REPORT, *supra* note 154, at 63.

<sup>268</sup> ANDERSON, *supra* note 253, at 159 (“As the migration of blacks from the rural South to southern and northern cities accelerated, white landowners, fearful of losing a critical mass of [black workers], returned larger shares of public tax funds to support the construction of rural schoolhouses.”).

<sup>269</sup> *Id.* at 236.

<sup>270</sup> NAEP is a test of academic proficiency in various subjects, including reading, math, and science. The purpose of NAEP is to “periodically [assess] students’ performance in several subjects in grades 4, 8, and 12.” The test takes two principal forms, an assessment of current proficiency and an assessment of long-term trends. SUSAN AUD, ET AL., NAT’L CTR. FOR EDUC. STAT., U.S. DEPT. OF EDUC., THE CONDITION OF EDUCATION 2011, at 332 (2011), <http://nces.ed.gov/pubs2011/2011033.pdf>.

2009, for example, the average science score for 12<sup>th</sup> grade white students was 27% higher than the average for their black peers.<sup>271</sup> In math, the white average was 23% higher.<sup>272</sup> The reading score average was 9% higher.<sup>273</sup> These trends have been doggedly persistent, and align with the SAT and ACT disparities discussed earlier.

More significantly, however, are educational outcome disparities. The high school dropout rate for black students is 10%, double the white rate.<sup>274</sup> Among those who graduate high school, about 60% of blacks begin college the following fall, compared to 71% of their white peers.<sup>275</sup> Once in college, about 45% of black students find themselves in need of remedial coursework; less than a third of white students find themselves in a similar predicament.<sup>276</sup> Only about 40% of black students seeking a bachelor's degree graduate within 6 years, compared to 60% of white students.<sup>277</sup> And the last link in the chain of educational disparities is that only 19% of blacks between the ages of 25 and 29 possess a bachelor's degree, less than half the white rate of 39%.<sup>278</sup>

Some have argued that health and health care disparities also contribute to educational disparities. Specifically, poor children often suffer from health problems, such as those relating to vision, hearing, and oral health, due to inadequate access to health care.<sup>279</sup> In addition, inadequate nutrition renders poor children more susceptible to health and behavioral problems.<sup>280</sup> The upshot to these disparities is that “when considered separately [they] only [have] a tiny influence on the academic achievement gap. But together, they add up to a cumulative disadvantage for lower-class children.”<sup>281</sup>

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<sup>271</sup> *Id.* at 51.

<sup>272</sup> *Id.* at 49.

<sup>273</sup> *Id.* at 45.

<sup>274</sup> The rates range from a high of 15% for Native American students to a low of 2% Asian students. *Id.* at 67.

<sup>275</sup> *Id.* at 68.

<sup>276</sup> *Id.* at 70 (listing the proportion of white college students who need remedial coursework at 31%).

<sup>277</sup> *Id.* at 73.

<sup>278</sup> *Id.* at 74.

<sup>279</sup> ROTHSTEIN, *supra* note 120, at 45.

<sup>280</sup> *Id.* at 44.

<sup>281</sup> *Id.* at 45.

The emergence of suburban communities discussed earlier fostered an unequal system of school funding that has a pervasively racial character. The creation of strong schools in all-white suburbs fostered further flight of people and resources out of central cities, leaving underfunded, crowded, and racially-isolated schools in its wake.<sup>282</sup> Even after the Supreme Court deemed segregated schools unconstitutional in *Brown v. Board of Education*,<sup>283</sup> this process was aided and solidified by gerrymandered school district boundaries and discriminatory housing practices.<sup>284</sup> These policies exploited the “reflexive relationship between schools and housing”<sup>285</sup> for discriminatory purposes.

But in the end, it all comes down to wealth. Like the geological version, the wealth fault line has been divisive and destructive. The deck has been stacked against blacks in ways that have produced crippling disparities. The “desperate and refractory” nature of black poverty<sup>286</sup> has prompted some to conclude that there is a “cost of being a Negro.”<sup>287</sup> And given the relationship between wealth and our conceptions of merit, this cost is the lowly places in which blacks disproportionately find themselves.

In light of this country’s appalling history of structural and state-imposed inequality, how can children born into the “wrong” families ever compete within the meritocracy? How can inequality caused by ancient brutality, past injustice, and present prejudice ever be corrected? Can distributive mechanisms be adopted that reward achievement rather than hollow notions of merit—and in the process, broaden opportunities to all whom deserve them?

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<sup>282</sup> Gotham, *supra* note 235, at 30 (“Creation of quality schools in the suburbs combined with new housing primed by the FHA and VA housing subsidies expanded the housing and school choices of whites and stimulated them to move out of the city.”)

<sup>283</sup> 347 U.S. 483 (1954).

<sup>284</sup> Gotham, *supra* note 235, at 30 (describing tactics used to preserve racial segregation in metropolitan Kansas City schools long after the *Brown* decision).

<sup>285</sup> *Id.* at 6.

<sup>286</sup> Duncan considered the poverty problem essentially a race problem. Otis Dudley Duncan, *Inheritance of Poverty or Inheritance of Race*, in ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES 108 (Daniel P. Moynihan ed., 1969), available at [http://faculty.washington.edu/charles/562\\_f2011/Week%208/Duncan%201969.pdf](http://faculty.washington.edu/charles/562_f2011/Week%208/Duncan%201969.pdf). See, also, KATZNELSON, *supra* note 98, at xi (referencing “the deep, even chronic dispossession that continues to afflict a large percentage of black America”).

<sup>287</sup> Duncan, *supra* note 286, at 108.

## V: THE HIGHER EDUCATION MERITOCRACY

Rawls's conception of justice as fairness is intently concerned with equality of opportunity. He acknowledges that the "nature and role of [society's] basic structure" encourages inequality.<sup>288</sup> But within a "fair system of cooperation," the operative question is, "by what principles are...differences in life-prospects<sup>289</sup> made legitimate and consistent with the idea" of fairness?<sup>290</sup> In attempting to answer this question, Rawls devised "two principles of justice":

- *Each person has the same inalienable claim to a full adequate scheme of equal basic liberties; and*
- *Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least-advantaged members of society.*<sup>291</sup>

The first principle is a general statement of equality. The second principle mandates that opportunities be open to all in an environment of equality, and that inequalities can exist only to benefit the least-advantaged citizens.

Rawls termed this construct the "difference principle." In essence, inequalities should be resolved in favor of the least-advantaged—and given that inequality rarely benefits the least-advantaged, it should be rarely tolerated under Rawls's principles of justice. This view is rooted in the concept of distributive justice, which asserts that public institutions "must work to keep property and wealth evenly enough shared over time to preserve...fair equality of opportunity."<sup>292</sup>

Rawls's view of justice as fairness provides a good framework for reimagining merit as a contextual, or achievement-based, construct. The legitimacy of our meritocracy requires equality of opportunity. Such equality can only be had after the effects of past injustices are acknowledged and remedied. Acknowledgement is difficult because it

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<sup>288</sup> RAWLS, *supra* note 25, at 40.

<sup>289</sup> *Id.* at 55 (arguing that an individual's life-prospects are determined by her social class, native endowments, opportunities to develop those endowments, and "good or bad luck, over the course of a life").

<sup>290</sup> *Id.* at 40.

<sup>291</sup> *Id.* at 42.

<sup>292</sup> Rawls also sought to preserve political liberties. RAWLS, *supra* note 25, at 51.

forces beneficiaries of injustice to question their own legitimacy within the meritocracy. It also requires a grasp of history and an appreciation for its radiating effects. Remedying is difficult because it often requires the use of compensatory preferences to reduce the effects of unjust preferences.<sup>293</sup> Preferences are often zero-sum, or at least perceived to be. Thus, preferences are controversial by their very nature. Moreover, even with the use of preferences, it is difficult, sometimes impossible, to make an aggrieved party whole.

Nobel Laureate economist Paul Krugman once wrote, “If you admit that life is unfair, and that there’s only so much you can do about that at the starting line, then you can try to ameliorate the consequences of that unfairness.”<sup>294</sup> The goal of the Achievement Framework proposed in this article is to ameliorate “starting line” unfairness, or inequality of opportunity, by embedding certain preferences within our higher education meritocracy. Pursuant to Rawls’s conception of justice as fairness, these preferences would favor the least-advantaged applicants, irrespective of race or ethnicity, in ways that would encourage racial and ethnic diversity.

Fundamentally, a meritocracy is a system of preferences—a system where certain traits, skills, and abilities are more highly desired than others. Within the higher education meritocracy, standardized test scores and grade point averages are considered objective indicators of one’s merit. Students with high test scores and undergraduate grade point averages are typically preferred over students with lower scores and grades. For example, the average median LSAT score for the 14 highest ranked law schools, the so-called “T14,”<sup>295</sup> is higher than the next 14 highest ranked schools and so on.<sup>296</sup> This is not to say that LSAT scores and UGPAs are the only

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<sup>293</sup> KATZNELSON, *supra* note 98, at xiii (discussing the controversial nature of “compensatory discrimination”).

<sup>294</sup> Paul Krugman, *More Thoughts on Equality of Opportunity*, N.Y. Times (Jan. 11, 2011), <http://krugman.blogs.nytimes.com/2011/01/11/more-thoughts-on-equality-of-opportunity/>.

<sup>295</sup> The 14 highest ranked law schools according to the US News Best Law Schools list are grouped together in popular parlance because the composition of the group has remained essentially the same since the list’s inception. *See, e.g.*, PowerScore Test Preparation, Why are the “Top 14” Law Schools called the “Top 14”? (Aug. 23, 2012), <http://blog.powerscore.com/lSAT/bid/211356/Why-are-the-Top-14-law-schools-called-the-Top-14>.

<sup>296</sup> The average median LSAT for T14 schools is 170, compared to 166 for the next 14. Calculations by author. Law School Admission Council, 2013 ABA/LSAC Law School Searchable Database, <https://officialguide.lsac.org/Release/SchoolsABADData/SchoolsAndLocation.aspx> (providing admissions statistics for every ABA-approved law school) (last visited Jan. 9,

admissions factors law schools consider; but in general, the better an applicant performs on these indicators, the better her chances of admission.

Preferences such as high test scores and grades are an accepted part of the higher education meritocracy. Most of us do not even view them as preferences, but rather as indisputable indicators of innate ability and merit. But the predictive value of these indicators shows that their assumptive power is overstated. In 2010, the median correlation between LSAT score and first-year law school grades was 0.36<sup>297</sup>—a low to slightly moderate relationship.<sup>298</sup> When combined with UGPA, the median correlation with first-year grades rose to 0.48—a moderate relationship.<sup>299</sup> Correlations become weaker when these factors are measured against subsequent year grades and bar passage.<sup>300</sup> None of this is to question the value of the LSAT and UGPA to the law school admission process; they serve useful functions when used correctly. But one must question the logic of our largely unchallenged acceptance of certain imperfect preferences and our vociferous objections to other preferences, such as race-conscious affirmative action.

The Achievement Framework is structured with the goal of encouraging racial and ethnic diversity, using contextual indicators of merit. While technically a class-conscious affirmative action program, the framework differs in the manner in which it accounts for race-based wealth and educational disparities. A major shortcoming of class-conscious affirmative action programs is that they do not typically broaden racial and ethnic

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2013). *See, also*, U.S. News & World Report, Best Law Schools, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (providing law school rankings) (last visited Jan. 9, 2013).

<sup>297</sup> Law School Admission Council, *LSAT Scores as Predictors of Law School Performance*, <http://www.lsac.org/jd/pdfs/lsat-score-predictors-of-performance.pdf> [hereinafter *LSAT Correlations*] (last visited Dec. 26, 2012).

<sup>298</sup> Compare Keith G. Calkins, *Applied Statistics—Lesson 5: Correlation Coefficients*, ANDREWS UNIVERSITY, <http://www.andrews.edu/~calkins/math/edrm611/edrm05.htm> (describing such correlations as low) (last visited Dec. 26, 2012), with Bud Gerstman, *Correlation*, SAN JOSE STATE UNIVERSITY, <http://www.sjsu.edu/faculty/gerstman/StatPrimer/correlation.pdf> (describing such correlations as moderate) (last visited Dec. 26, 2012).

<sup>299</sup> *LSAT Correlations*, *supra* note 297, at 63.

<sup>300</sup> Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of College Admissions Decisions* 12 (U. of Hous. Law Ctr., Inst. For Higher Educ., Monograph 97-1, 1997) <http://www.law.uh.edu/ihehg/monograph/97-1.pdf> (highlighting the difficulties associated with using admissions criteria to predict outcome variables, such as third-year GPA and bar exam passage).

diversity. However, an affirmative action program based on a contextual conception of merit could prove to be an efficient race-neutral means of promoting racial diversity. While people of all races and ethnicities face poverty and limited opportunities, it is doubtless that black and Hispanic people tend to be affected much more profoundly by these debilitating realities.

### *A. Opposition to Racial Preferences*

So if racial and ethnic diversity is a goal of the Achievement Framework, why not consider these factors explicitly? The framework's indirect treatment of race is a response to the political and legal climate surrounding race-conscious affirmative action. Voters and lawmakers in seven states have passed bans on race-conscious affirmative action, with another ban imposed via gubernatorial executive order.<sup>301</sup> Additionally, the U.S. Supreme Court has taken an increasingly hostile view of such policies in admissions. Strategies for ensuring racial and ethnic diversity must adapt to these shifting political and legal winds.<sup>302</sup>

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<sup>301</sup> California (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2011), and Oklahoma (2012) had affirmative action bans passed or imposed in the parenthetical years. In 2008, Colorado became the only state to defeat a voter referendum proposing a ban on race-conscious affirmative action. National Conference of State Legislatures, Affirmative Action; State Action, <http://www.ncsl.org/issues-research/educ/affirmative-action-state-action.aspx> (last visited Dec. 27, 2012).

<sup>302</sup> A notable exception to this trend is an 8-7 Sixth Circuit decision that deemed Michigan's race-conscious affirmative action ban in violation of the Equal Protection Clause. The court reasoned that the ban, which resulted from a voter referendum to amend the state constitution, placed an unconstitutional burden on applicants of color to secure preferences in the higher education admissions process. The majority opinion illustrated this point by explaining how a legacy applicant had four potential options in securing preferential treatment in the admissions process. They included lobbying the admissions committee, university leadership, or the university board of trustees, and if those efforts failed, legacy applicants could attempt to get a preference written into the state constitution. On the other hand, a black applicant seeking a racial preference only had one option—the most difficult and expensive one: amend the state constitution. The court concluded that the ban ran afoul of the Equal Protection Clause's prohibition against majority groups manipulating political processes in ways that place unique burdens on minority groups. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, available <http://www.ca6.uscourts.gov/opinions.pdf/12a0386p-06.pdf>. The court's decision has been stayed pending potential review by the U.S. Supreme Court; therefore, the ban is still in force. [http://www.diversity.umich.edu/legal/filings/UofM\\_Prop\\_2-6th\\_Circuit\\_Order\\_Staying\\_Mandate-30NOV2012-11742354\\_1.pdf](http://www.diversity.umich.edu/legal/filings/UofM_Prop_2-6th_Circuit_Order_Staying_Mandate-30NOV2012-11742354_1.pdf)



Much of the angst over race-conscious affirmative action is overwrought. The notion that a limited consideration of race as a potential plus-factor caused an individual applicant to be denied admission is farfetched, if not laughable. The facts underlying the *Fisher v. Texas*<sup>303</sup> case illustrates this fallacy. The plaintiff, Abigail Fisher, was denied freshman admission to the University of Texas at Austin (UT).<sup>304</sup> She then filed suit arguing that UT's consideration of race in the admissions process violated her rights under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>305</sup>

UT's admissions process was painstaking in its adherence to prevailing Supreme Court precedent.<sup>306</sup> In *Grutter v. Bollinger*, the Court held that colleges or universities had a compelling interest in "attaining a diverse student body,"<sup>307</sup> and an applicant's race or ethnicity could be considered as a potential plus-factor, as long as the process allowed for an individualized review of all applicants<sup>308</sup> and applied no rigid racial quotas or "predetermined diversity bonuses."<sup>309</sup> In its admissions process, UT considered race as a component of an applicant's Holistic Score, which was a component of the applicant's Personal Achievement Index, which was a component of the applicant's overall Index, which determined admission for about 20% of the class.<sup>310</sup> Put simply, race is a factor within a factor within a factor within a factor. Yet, Fisher claimed this limited consideration was the reason for her denial of admission, in spite of the fact that she was applying to one of the most competitive flagship universities in

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<sup>304</sup> Fisher was offered conditional admission that would have allowed her to transfer to UT as a sophomore if she enrolled at another University of Texas campus as a freshman and earned a 3.2 or higher GPA on at least 30 credits. She declined this offer. Joint Appendix at 75, *Fisher v. University of Texas at Austin*, No. 11-345 (2011).

<sup>305</sup> The Fourteenth Amendment grants an individual right to "equal protection of the laws." It requires that "all government action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry." Title VI applies to entities receiving federal funds and prohibits racial discrimination that would violate the Fourteenth Amendment. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>306</sup> The district court judge who presided over the *Fisher* trial acknowledged the extent to which UT-Austin had complied with affirmative action precedent espoused in *Grutter v. Bollinger* when he remarked, "If the Plaintiffs are right, *Grutter* is wrong." *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d. 587, 612 (W.D. Tex. 2009).

<sup>307</sup> *Grutter*, *supra* note 305, at 328.

<sup>308</sup> *Id.* at 336.

<sup>309</sup> *Id.* at 337.

<sup>310</sup> *Fisher*, *supra* note 306 (providing a detailed explanation of UT's admissions process)

the country with credentials that fell short of automatic admission, through which more than 80% of the class was admitted. Sadly, she is far from alone in her assumptions.

Views on race-conscious affirmative action reflect differing worldviews. Perspectives are informed by levels of awareness and acknowledgement of the root causes of racial and ethnic disparities. *Regents of the University of California v. Bakke*,<sup>311</sup> illustrates this point. In *Bakke*, the plaintiff, Allan Bakke, was denied admission to the University of California at Davis Medical School. He then filed suit arguing that the school's setting aside of sixteen seats in the entering class for underrepresented students of color violated his rights pursuant to the Equal Protection Clause, Title VI, and provisions of the California Constitution.<sup>312</sup>

*Bakke* was a messy case, spawning seven separate opinions among the nine Justices.<sup>313</sup> A central focus of the *Bakke* opinions was the level of judicial scrutiny that should be applied to the admissions policy. In the controlling opinion, Justice Lewis Powell reasoned that because the consideration of race and ethnicity was a component of the policy, it was "inherently suspect...thus [calling] for the most exacting judicial examination."<sup>314</sup> In further justifying this strict scrutiny, Powell asserted that the absence of any judicial determination that the Medical School had previously discriminated against underrepresented applicants of color rendered the school's expressed remedial intent immaterial, if not illegitimate.<sup>315</sup> The Constitution, according to Powell, had to be colorblind in its suspicion of policies that classified individuals based on race or ethnicity.

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<sup>311</sup> 438 U.S. 265 (1978).

<sup>312</sup> The Medical School set aside the seats through a special admissions process dedicated to applicants from "disadvantaged" backgrounds, which, in practical terms, meant applicants of color. The special process was established in response to very low levels of racial and ethnic diversity in the entering classes. *Bakke*, *supra* note 311, at 275.

<sup>313</sup> This led to some confusion about the precedential effect of the case. The Supreme Court would later clarify in *Grutter* that Justice Powell's opinion was controlling. Powell's opinion was joined in some part by every other Justice. *See, e.g.*, Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C.L. REV. 521 (2002).

<sup>314</sup> *Bakke*, *supra* note 311, at 291.

<sup>315</sup> Powell held that while the Medical School had a compelling interest in enrolling a diverse student body, its special admissions process unconstitutionally deprived Bakke and other white applicants of the opportunity to compete for one of the special admissions seats. *Id.* at 318.

Conspicuously absent from Powell's analysis was an appreciation of history and context—points highlighted in Justice William Brennan's dissent. Justice Brennan asserted that the Court should assess the policy's constitutionality using a less stringent level of scrutiny.<sup>316</sup> He argued that the consideration of race "as a means of remedying past societal discrimination" was not suspect in the same sense as policies premised on racial exclusion.<sup>317</sup> Brennan reviewed the histories of the Fourteenth Amendment and Title VI and concluded that they were passed with the goal of eradicating discrimination perpetrated against black Americans. Brennan found it perverse that laws intended to broaden opportunity to an aggrieved group were now being used to forestall a policy seeking to serve the same purpose. He warned, "We cannot...let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."<sup>318</sup>

Justice Thurgood Marshall reminded the Court that "during most of the past 200 years, the Constitution...did not prohibit the most ingenious and pervasive forms of discrimination against the Negro."<sup>319</sup> Marshall characterized the disparities black Americans faced as being "the consequence of centuries of unequal treatment."<sup>320</sup> And similar to Brennan, he noted that using the Fourteenth Amendment to challenge a race-conscious affirmative action program was "more than a little ironic."<sup>321</sup>

Justice Harry Blackmun wrote about the reality—the utter dearth of professionals of color. He lamented that a quarter century after *Brown*, the U.S. had not reached "a stage of maturity" where race-conscious affirmative action policies were no longer necessary.<sup>322</sup> And true to the theme, he found it "somewhat ironic" that the preferential treatment of race would render so many "deeply disturbed" when preferences for children of alumni, wealthy applicants, and athletes are readily accepted.<sup>323</sup> He warned, "We

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<sup>316</sup> Brennan's non-controlling opinion, which was joined by three other Justices, concurred with Powell's assertion that the Medical School had a compelling interest in a diverse student body, but dissented from Powell in asserting that the special admissions program was indeed constitutional. *Id.* at 379.

<sup>317</sup> *Id.* at 328.

<sup>318</sup> *Id.* at 327.

<sup>319</sup> *Id.* at 387.

<sup>320</sup> *Id.* at 395.

<sup>321</sup> *Id.* at 400.

<sup>322</sup> *Id.* at 403.

<sup>323</sup> *Id.* at 404.

cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.”<sup>324</sup>

The philosophical approaches taken by the Justices in *Bakke* capture much of the debate around race-conscious affirmative action policies. Individuals who adhere to the notion that equality in principle is equality in fact tend to oppose race-conscious preferences. They tend to believe, as did Justice Powell, that “there is a measure of inequity in forcing innocent persons...to bear the burdens of redressing grievances not of their making.”<sup>325</sup> Their views are typified by the convenient disregarding of history, the relentless promotion of an ahistorical narrative of individualism,<sup>326</sup> and the pious embracing of after-the-fact equality.<sup>327</sup> In essence, theoretical principles undergo reification, in spite of history, context, and reality.

About 30 years after *Bakke*, Chief Justice John Roberts wrote an opinion striking down policies that considered race in the assignment of students to public K12 schools in Seattle and Louisville.<sup>328</sup> Like the admissions processes in *Bakke*, *Grutter*, and *Fisher*, these policies were premised on encouraging diversity and fostering opportunity. He reasoned, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” This tin ear declaration has become a rallying cry for opponents of race-conscious affirmative action.<sup>329</sup> The more legitimate view, however,

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<sup>324</sup> *Id.* at 407.

<sup>325</sup> *Id.* at 298.

<sup>326</sup> See, e.g., Julian Bond, Remarks at Princeton (Mar. 22, 2000) (transcript available at <http://bleakbeauty.com/bond.html>).

<sup>327</sup> Julian Bond, social activist and former chairman of the NAACP, provided the following analogy:

*It is the fourth quarter of a football game between the white team and the black team. The white team is ahead 145 to 3. They have been cheating since the game began. The white team owns the ball, the uniforms, the field, the goalposts, and the referees. All of sudden, the white quarterback, who suddenly feels badly about things which happened before he entered the game, turns to the black team and says: “Hey fellows, can’t we just play fair?” Of course, playing “fair” is double-speak for freezing the status quo in place, permanently fixing inequality as part of the American scene. Id.*

<sup>328</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

<sup>329</sup> See, e.g., Ilya Shapiro, *The Way to Stop Discrimination on the Basis of Race Is to Stop Discriminating on the Basis of Race*, CATO INSTITUTE, Apr. 22, 2009, <http://www.cato-at-liberty.org/ricci-v-destafano/>.

was proffered by Justice Blackmun in *Bakke*: “In order to get beyond racism, we must first take account of race.”<sup>330</sup>

Today, black and Hispanic persons are vastly underrepresented in selective higher education and among the ranks of the professions. For example, even though both groups collectively account for about 30% of the population,<sup>331</sup> they only account for about 8.5% of doctors and lawyers.<sup>332</sup> This trend persists among Native Americans<sup>333</sup> and some Asian ethnicities.<sup>334</sup> If America is to transcend its regretful history of racial discrimination and become the post-racial melting pot we aspire it to be, then all groups must be given equal opportunity to attain success. We must acknowledge that the disparities we see today are the result of intentional efforts, and, thus, intentional efforts are needed to close them. The Achievement Framework provides a potential path forward.

## VI: THE ACHIEVEMENT FRAMEWORK

Legal scholar Michael Olivas once wrote that “selective admissions have always been the preserve of the advantaged.”<sup>335</sup> Similarly, scholar Bryan K. Fair argued that selective admissions processes are “social engineering to preserve the elites.”<sup>336</sup> The wealthy, or advantaged, fare well in selective admissions because the embedded preferences favor them. It is this effect

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<sup>330</sup> *Bakke*, *supra* note 311, at 407.

<sup>331</sup> *State & County QuickFacts, USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>332</sup> *Compare* American Bar Association, Lawyer Demographics (2011), [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2012\\_revised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf), and American Medical Association, Total Physicians by Race/Ethnicity (2008), <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/minority-affairs-section/physician-statistics/total-physicians-raceethnicity.page>.

<sup>333</sup> *Id.*

<sup>334</sup> Asians are often referred to as “model minorities,” given their collective overrepresentation at many of the nation’s most selective colleges and universities and in many professions. This broad perception, however, hides wide disparities among ethnicities comprising the group. East Asians (e.g. Chinese, Koreans) tend to be overrepresented, whereas Southeast Asians (e.g. Filipinos, Vietnamese) tend to be underrepresented. *See, e.g.,* William W. Yu, *Lost in the Numbers: The Underrepresentation of Asian American Groups and the Case for Disaggregating “Asian” Data* (SelectedWorks, Sep. 2009) [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=william\\_yu](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=william_yu).

<sup>335</sup> Olivas, *supra* note 300, at 60.

<sup>336</sup> Bryan K. Fair, *Re(Caste)ing Equality Theory: Will Grutter Survive Itself By 2028*, 7 U. Pa. J. Const. L. 721, 733 (2005).

that the Achievement Framework would most directly challenge. The framework employs Rawlsian social engineering for the non-elites, particularly those from underrepresented racial and ethnic groups. It is based on a fundamental belief that indicators of merit become indicators of achievement only when context is considered.

The framework is illustrated using legal education. The law school admissions process is one of the most selective in higher education. There are 201 law schools accredited by the American Bar Association, and, in 2011, 154 of them had admission rates under 50%.<sup>337</sup> Most law schools consider a range of factors, numerical (e.g. LSAT) and non-numerical (e.g. personal statements).<sup>338</sup> Admissions processes take many forms. Some law schools use an index-based process where they apply an applicant's LSAT score and UGPA to a numerical formula, and use the resulting value to classify the applicant based on his relative strength.<sup>339</sup> The formulas are usually designed to correlate with, or predict, certain outcomes.<sup>340</sup> For example, a higher index value might be associated, imperfectly, of course, with higher first-year grades.

Common applicant classifications include presumptive-admit (high index value), committee review (middling index value), and presumptive-deny (low index value).<sup>341</sup> These classifications determine the treatment an applicant receives in the admissions process and, therefore, his chances of admission. For "presumptive" applicants, law schools will likely perform only a cursory review of the application materials to ensure that nothing necessitates a departure from the underlying presumption. As a result,

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<sup>337</sup> Calculations by author. Law School Admission Council, 2013 ABA/LSAC Law School Searchable Database, <https://officialguide.lsac.org/Release/SchoolsABADData/SchoolsAndLocation.aspx> (last visited Jan. 9, 2013).

<sup>338</sup> See, e.g., Saint Louis University School of Law, J.D. Admissions, <http://www.slu.edu/school-of-law-home/admissions/jd-admissions> (last visited Dec. 26, 2012).

<sup>339</sup> For example, the University of Arkansas School of Law uses the following formula to select students: (LSAT score) + (13.4 x UGPA) = Prediction Index. In-state applicants with index values of 200 or higher and out-of-state applicants with values of 205 or higher are automatically offered admission. University of Arkansas School of Law, J.D. Program, <http://law.uark.edu/academics/jd/> (last visited Dec. 26, 2012).

<sup>340</sup> Olivas, *supra* note 300, at 3 ("Institutions strive to adopt admissions criteria that will accurately and reliably predict optimum performance in their programs.")

<sup>341</sup> DeLoggio Admissions Achievement Program, Presumptive Admit, Presumptive Deny, and Discretionary, <http://www.deloggio.com/admproc/presumptive.html> (last visited Dec. 26, 2012) (providing an overview of how this process works).

presumptive admits tend to be offered admission and presumptive denys tend to be denied admission.<sup>342</sup> “Committee review” applicants usually receive the fullest consideration within an index-based process, and final decisions are harder to predict.

The Achievement Framework is based on an index-based admissions process. Two types of indexes are used to classify applicants: Overachievement Index and Disadvantage Index.<sup>343</sup>

#### *A. Overachievement Index*

The Overachievement Index measures the extent to which an applicant has achieved a higher LSAT/UGPA index value than could have been reasonably expected. It is essentially an LSAT/UGPA index that is compared to the following two benchmarks: 1) the median LSAT/UGPA index value among the law school’s prior-year entering class and 2) the median LSAT/UGPA index value among the applicant’s undergraduate peers.<sup>344</sup> If the applicant’s value exceeds either benchmark, the applicant is an “Overachiever.” If the applicant’s value exceeds either benchmark by a preset amount (or more), the applicant is a “High Overachiever.” (The significance of these classifications will be explained later.) If the applicant’s value exceeds one benchmark, but not the other, only the exceeding value will be considered for classification purposes.

The purpose of using the LSAT/UGPA index value among the previous year’s entering class as a benchmark is to contextualize merit in light of the most recent cohort of new students. Statistical profiles tend to remain relatively stable from year-to-year. So the median value from a given year

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<sup>342</sup> A “presumptive” classification is by no means a final determination. Factors such as character and fitness issues could cause a presumptive admit to be denied admission, and a compelling background can prompt an admissions committee to offer admission to a presumptive denied applicant.

<sup>343</sup> These titles are borrowed from the University of Colorado’s class + race-based affirmative action admissions process. *See*, Matthew N. Gaertner, Assessing a New Approach to Class-Based Affirmative Action (2011) (unpublished submission for the 2011 AERA Division J session “Promoting College Access”), available at <http://www.usc.edu/programs/cerpp/docs/GaertnerDivJCBAAs.pdf>.

<sup>344</sup> The Law School Admissions Council (LSAC) provides law schools with a report for every applicant listing, among other things, the median GPA for all law school applicants from an applicant’s undergraduate institution. It seems within the realm of possibility that median LSAT scores could be provided in a similar way.

is usually a useful guide for the year after. This type of contextualization is already common among law schools.

The purpose of using the value among an applicant's undergraduate peers as a benchmark is to contextualize merit in light of the applicant's background. An applicant's choice of undergraduate institution reflects many factors—academic, social, personal, and financial.<sup>345</sup> These factors often have a routing effect, creating broad homogeneities within institutions.<sup>346</sup> For example, wealthier students tend to attend certain schools while poorer students tend to attend others. Thus, consideration of an applicant's index value as compared to his peers provides a better way of contextualizing his level of achievement. It is against this benchmark where black and Hispanic applicants would benefit most. Lower median LSAT scores and UGPAs often place these applicants at a disadvantage in the admissions process. But a contextual review of these indicators would likely frame them more favorably.

Consider the following example: Jane Smith, an applicant to Great Law School, has an LSAT/UGPA index value of 52. The median value for Great Law's previous entering class was 54, but the median value among law school applicants from Jane's undergrad was 47. Per the Overachievement Index, Jane would be an Overachiever because her index value (52) exceeds the median among her undergraduate peers (47). Jane would be a High Overachiever if Great Law decided to confer that status on any applicant whose value exceeded either benchmark by, say, 3 or more points. This contextual framing of Jane's index value would probably result in her receiving more favorable consideration than she would have received if her value was only compared to the previous year's class.

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<sup>345</sup> See, generally, Melanie L. Hayden, Factors That Influence the College Choice Process for African American Students (May 10, 2000) (unpublished M.A. thesis, Virginia Polytechnic Institute and State University), available at <http://scholar.lib.vt.edu/theses/available/etd-05182000-14100013/unrestricted/thesis.pdf>.

<sup>346</sup> See, e.g., Laura W. Perna et. al, Showing Them The Money: The Role of Institutional Financial Aid Policies and Communication Strategies in Attracting Low-Income Students 3 (2009) (draft book chapter presented at the College Board's Forum 2009), available at <http://media.routledgeweb.com/files/9780415803229/perna-chapter.pdf> (referencing the "continued stratification of college choice by family income"). See, also, SUSAN AUD, ET AL., NAT'L CTR. FOR EDUC. STAT., U.S. DEPT. OF EDUC., THE CONDITION OF EDUCATION 2010, at 117 (2011), [http://nces.ed.gov/programs/coe/pdf/coe\\_hec.pdf](http://nces.ed.gov/programs/coe/pdf/coe_hec.pdf) (showing racial and ethnic disproportions in the type of higher education institutions attended).



### *B. Disadvantage Index*

The Disadvantage Index measures the extent to which an applicant has overcome socioeconomic and educational disadvantages. The index is comprised of six factors:

- Applicant's net worth (if under age 30, parent's net worth<sup>347</sup>)
  - Net worth is positively associated with college-going and educational attainment rates.<sup>348</sup> In calculating net worth, schools would require applicants to provide an accounting of all assets (e.g., real estate, automobiles, stocks and bonds, jewelry, cash) and all liabilities (e.g., mortgages, students loans, credit card debts). Applicants of lower net worth would benefit most from inclusion of this factor in the index.
- Applicant's income (if under age 30, parent's income)
  - Income is positively associated with college-going and educational attainment rates.<sup>349</sup> Applicants with lower income would benefit most from inclusion of this factor in the index.
- Applicant's first-generation college student status
  - First-generation college student status is negatively associated with college attendance and completion.<sup>350</sup> Applicants who are first-generation college students would benefit most from inclusion of this factor in the index.
- Applicant's Pell Grant status

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<sup>347</sup> The purpose of requiring applicants under the age 30 to report their parents' net worth and income is to account for the financial support that many parents provide adult children, especially those in school. The requirement is also a recognition that the effects of parental wealth and income persist throughout the life of the child, even into adulthood. Many law schools impose a similar requirement for students applying for need-based financial aid. See, e.g., Berkeley Law, University of California, Presumptive Admit, Presumptive Deny, and Discretionary, <http://www.law.berkeley.edu/12689.htm> (last visited Dec. 26, 2012).

<sup>348</sup> See, e.g., Su Jin Jez, *The Differential Impact of Wealth vs. Income in the College-Going Process* 14 (unpublished draft article) ("Wealth has a statistically significant effect on who attends college, as students from families with greater wealth are more likely to attend college than their less wealthy counterparts."), available at [http://www.usc.edu/programs/cerpp/docs/The\\_Differential\\_Impact\\_of\\_Wealth\\_vs\\_Income\\_110426.pdf](http://www.usc.edu/programs/cerpp/docs/The_Differential_Impact_of_Wealth_vs_Income_110426.pdf).

<sup>349</sup> See, e.g., WILLIAM G. BOWEN ET AL., *CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES* 81 (2009).

<sup>350</sup> *Id.* at 23 (charting the effects of parental education on educational attainment of their children).

- Pell Grants are federal education grants for undergraduate students with unmet financial need.<sup>351</sup> Lower socioeconomic status is negatively associated with college completion.<sup>352</sup> Applicants who received Pell Grants in college would benefit most from inclusion of this factor in the index.
- Percentage of Pell-eligible students at applicant's college or university
  - An institution's percentage of Pell-eligible students is a reflection of the socioeconomic status of its students. Selective, well-endowed institutions tend to enroll fewer Pell-eligible students than less selective and less well funded institutions.<sup>353</sup> Applicants who attended institutions that enrolled high percentages of Pell-eligible students would benefit most from inclusion of this factor in the index.
- Graduation rate at applicant's degree-granting college or university
  - Colleges and universities with lower graduation rates send proportionally fewer students to graduate and professional school than institutions with higher graduation rates. These schools tend to be lesser-resourced, serving students of lower socioeconomic status and offering fewer safety nets for those who encounter academic or financial problems.<sup>354</sup> A student who graduates from such an institution has likely had to work harder and overcome more obstacles, with less institutional assistance, than the typical graduate of a school with a high graduation rate. Applicants who attended schools with lower graduation rates would benefit most from inclusion of this factor in the index.

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<sup>351</sup> *Id.* at 155.

<sup>352</sup> *Id.* at 37 (“We find a strong, highly consistent relationship between a student’s socioeconomic background and his or her probability of graduating.”).

<sup>353</sup> See, e.g., Beck Supiano & Andrea Fuller, *Elite Colleges Fail to Gain More Students on Pell Grants*, CHRON. HIGHER EDUC., Mar. 27, 2011, available at <http://chronicle.com/article/Pell-Grant-Recipients-Are/126892/> (noting that during the 2008-2009 school year, Pell-eligible students represented just 15% of the enrollment at the nation’s 50 wealthiest colleges, compared to 26% of students overall).

<sup>354</sup> See, e.g., Daniel de Vise, *Grad-rate Ranking Reveals Elite List of Small, Wealthy Schools*, WASH. POST, Mar. 5, 2012, [http://www.washingtonpost.com/blogs/college-inc/post/grad-rate-ranking-reveals-elite-list-of-small-wealthy-schools/2012/03/05/gIQAqHSosR\\_blog.html](http://www.washingtonpost.com/blogs/college-inc/post/grad-rate-ranking-reveals-elite-list-of-small-wealthy-schools/2012/03/05/gIQAqHSosR_blog.html) (“The colleges with the very highest four-year graduation rates tend to have fairly small undergraduate enrollments and to spend a lot of money on their students.”).

In constructing the Disadvantage Index, each factor will have numerical values associated with it.<sup>355</sup> Binary factors, such as first-generation status, could be assigned values for each of their two possible outcomes. Continuum-based factors, such as income, could be contextualized using national data or intra-applicant comparisons.<sup>356</sup> For example, an applicant's income could be assigned a particular value based on the percentile in which it falls nationally. It would be vital to the goal of increasing racial and ethnic diversity that assigned values are nuanced. Class-conscious affirmative action programs are typically too blunt. For example, providing a boost to all applicants with below-median wealth would likely ensure that poorer whites would benefit disproportionately, given their sheer numbers. But providing different numerical boosts based on nuanced assessments of wealth percentiles would ensure that the particularly grinding poverty that disproportionately affects black and Hispanic people is considered.

The resulting Disadvantage Index value could then be compared to a benchmark, such as the median Disadvantage Index value of the previous year's entering class. If the applicant's value indicates that he has overcome more disadvantages than the benchmark, the applicant would be deemed "Disadvantaged". If the applicant's level of disadvantage is particularly acute, he would be deemed "Highly Disadvantaged".<sup>357</sup>

Consider the following example: John Smith, an applicant to Rich Law School, has a Disadvantage Index value of 21. The median value for Rich Law's previous entering class was 13. Rich Law uses a formula that assigns higher values to higher levels of disadvantage, thus, John would be deemed "Disadvantaged" by Rich Law. John would be considered "Highly Disadvantaged" if Rich Law decided to confer that status on any applicant whose value exceeded the previous year's median by, say, 5 or more points.

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<sup>355</sup> See, generally, ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT, HANDBOOK ON CONSTRUCTING COMPOSITE INDICATORS: METHODOLOGY AND USER GUIDE (2008), <http://www.oecd.org/std/leadingindicatorsandtendencysurveys/42495745.pdf> (explaining the mechanics of constructing a composite index).

<sup>356</sup> In contextualizing an applicant's net worth, schools could use relevant national data, or they could compare applicants' net worth against each other. See, e.g., *Wealth and Asset Ownership*, U.S. CENSUS BUREAU, <http://www.census.gov/people/wealth/> (providing national data on income and wealth).

<sup>357</sup> The significance of a particular index value will be determined by the index itself. Some schools could adopt formulas that assign index values directly reflecting levels of disadvantage (i.e. the more disadvantaged the applicant, the higher his index value). Other schools could adopt formulas assigning indirect values (i.e. the more disadvantaged the applicant, the lower his index value).

*C. Index Classifications*

Each Index has different potential classifications. Through the Overachievement Index, an applicant can be deemed an “Overachiever”, a “High Overachiever”, or not having overachieved at all. Through the Disadvantage Index, an applicant can be deemed “Disadvantaged”, “Highly Disadvantaged”, or not disadvantaged. An applicant’s classification on each Index determines the underlying presumption, if any, assigned to his application for admission. The following table provides a guide:

	No overachievement	Overachiever	High Overachiever
No disadvantage	<b>Presumptive Deny</b>	<b>Committee Review</b>	<b>Presumptive Admit</b>
Disadvantaged	<b>Committee Review</b>	<b>Presumptive Admit</b>	<b>Presumptive Admit</b>
Highly Disadvantaged	<b>Presumptive Admit</b>	<b>Presumptive Admit</b>	<b>Presumptive Admit</b>

As exhibited in the table, overachievement and disadvantage are preferred and rewarded in the Achievement Framework. “High Overachiever” applicants are considered presumptive admits, irrespective of their level of disadvantage. This means that admission is likely for any applicant whose LSAT/UGPA index value exceeds either of the two benchmarks by a certain threshold set by the law school. The relative nature of overachievement ensures that consideration of LSAT scores and UGPAs is rendered fairer through the appreciation of context. Similarly, “Highly Disadvantaged” applicants receive favorable treatment in the Achievement Framework. These applicants are considered presumptive admits, irrespective of their level of overachievement.

Conversely, applicants who have suffered no disadvantage and have exhibited no overachievement are considered presumptively denied. Many of these applicants would have LSAT scores and UGPAs that look acceptable, if not impressive, when viewed out of context. But the Achievement Framework requires either disadvantage or overachievement in order for an applicant to receive committee review or presumptive admit consideration. The egalitarian goals of the framework ensure that applicants of privilege who fail to distinguish themselves academically and on the LSAT are in the weakest position.

#### *D. Benefits and Burdens*

The purpose of a selective admissions process is to assemble the “best” class possible through the assessment of applicants’ qualifications. Typically, there are some elements of relative comparison among applicants, but they tend to lack depth. Standardized test scores are considered as if all applicants had the same opportunities to score highly. The same superficiality pervades the consideration of other factors, such as past grades. The Achievement Framework, however, seeks to facilitate the assessment of applicant qualifications in a manner that accounts for societal inequality. It is through such assessment that racial and ethnic diversity can be encouraged in our nation’s selective higher education institutions, even if these factors are not considered directly.

The value of considering test scores and grades in a manner that accounts for background inequality is supported by research. Education researcher William Goggin proposed a “merit-aware” admissions model, upon which the Achievement Framework is largely based.<sup>358</sup> Goggin argued that students who exceed reasonable expectations should be rewarded in the scrum for seats in selective schools. He offered his model as a response to the increasingly voluble opposition to race-conscious affirmative action.<sup>359</sup> He argued that a consideration of merit “given the hand that [an applicant] has been dealt”<sup>360</sup> could be an effective substitute for the explicit consideration of race.<sup>361</sup> Tests of Goggin’s model show promise. One such

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<sup>358</sup> Goggin, *supra* note 24.

<sup>359</sup> *Id.* at 2.

<sup>360</sup> *Id.* at 3.

<sup>361</sup> *Id.* at 4 (“Make no mistake, incorporated in the right admissions model, such a merit measure would be as powerful as race and ethnicity in achieving the goals of affirmative action.”).

test concluded that the model predicted persistence as well as an SAT score, while also increasing student diversity.<sup>362</sup> A recent report on the University of Colorado's class-conscious affirmative action program concluded that it would encourage racial and ethnic diversity, even if the university used it without the race-conscious elements currently appended.<sup>363</sup> Colorado's program shares philosophical moorings with Goggin's model.

The Achievement Framework offers promise as a means of encouraging racial and ethnic diversity by accounting for race-neutral background disparities that nonetheless bear racial characteristics. Standardized test scores and UGPAs are reflections of past academic preparation, which is a reflection of past academic opportunity. As discussed earlier, opportunities for black and Hispanic children tend to be restricted in ways that manifest throughout their educational career. The Overachievement Index and Disadvantage Index capture these lingering realities. The consideration of LSAT scores and UGPAs in light of an applicant's peers accounts for not only background inequality, but also better reflects achievement. In addition, the preferential consideration of disadvantage in the admissions process reflects the meritorious aspects of overcoming adversity.

Implementation of an achievement-based affirmative action program would not be without difficulties. The most fundamental difficulty would be gaining buy-in. Conventional notions of merit are mostly dismissive of context—and the rare instances of contextual consideration usually benefit the privileged. Ask an admissions committee to compare a 3.4 from Stanford to a 4.0 from Mississippi Valley State. The assumptive view would likely be that Stanford's GPA is more impressive, in spite of it being lower. The Achievement Framework, however, would add contextual considerations that validate the experiences of students who attend schools like Mississippi Valley.<sup>364</sup> An applicant who overcomes poverty, subpar

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<sup>362</sup> Edward P. St. John, et al., *Merit-Aware Admissions in Public Universities*, THE NEA HIGHER EDUC. J. 39 (2005), [http://www.nea.org/assets/img/PubThoughtAndAction/TAA\\_01Win\\_05.pdf](http://www.nea.org/assets/img/PubThoughtAndAction/TAA_01Win_05.pdf). Researchers have also concluded that a merit-aware selection process would increase racial and ethnic diversity among state-funded merit scholarship recipients. Edward P. St. John & Choong-Guen Chung, *Merit and Equity: Rethinking Award Criteria in the Michigan Merit Scholarship Programs*, in PUBLIC FUNDING OF HIGHER EDUCATION: CHANGING CONTEXTS AND NEW RATIONALES 132 (Edward P. St. John & Michael D. Parsons eds., 2004).

<sup>363</sup> Gaertner, *supra* note 343, at 15.

<sup>364</sup> Mississippi Valley (MVSU) and Stanford serve very different student populations. Eighty-two percent of MVSU students qualify for Pell Grants, compared to just 16% of Stanford students. Unsurprisingly, Stanford's 6-year graduation rate of 96% greatly

primary and secondary education, and under-resourced higher education, and still manages to overachieve should be boosted in the same manner as someone who has excelled in more traditional ways.

The process of constructing the indexes would have to begin with a discussion of institutional values. Indexes are mechanical, but they are in no way value-neutral. The factors that are considered, the manners in which they are weighted, and the outcomes to which they are attached are expressions of values and goals. Thus, constructing indexes would require more than mere manipulation of numerical formulas; it would require difficult discussions about how merit is defined and the institution's role in correcting social injustice. The Achievement Framework's very premise challenges long-held perceptions about what merit looks like. Overcoming these perceptions would be difficult.

The second difficulty relates to the complicated nature of the framework. A comprehensive consideration of relevant factors is labor-intensive and relatively expensive. It is much easier to take an indicator at face value than to do a deeper, individualized assessment. This seductive efficiency is a major reason why standardized test scores and GPAs have such outsized influence in the admissions process. An inherent inefficiency is the indirect consideration of race and ethnicity. Ideally, these factors would be considered directly and, thus, more efficiently,<sup>365</sup> but the current legal and political climate makes such consideration unwise. An institution seeking

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exceeds MVSU's rate of 24%. *Compare* U.S. Dept. of Educ., College Navigator: Mississippi Valley State University, <http://nces.ed.gov/collegenavigator/?q=mississippi+valley&s=all&id=176044> (listing MVSU's statistics) (last visited Jan. 8, 2012) *with* U.S. Dept. of Educ., College Navigator: Stanford University, <http://nces.ed.gov/collegenavigator/?q=stanford&s=all&id=243744> (listing Stanford's statistics) (last visited Jan. 8, 2012). In addition to the socioeconomic differences between the student bodies, the graduation disparities are also aided by differences in institutional resources. Stanford's endowment of \$16.5 billion is one of the highest in higher education and is almost 10,000 times the size of MVSU's endowment of \$1.7 million. U. S. News & World Report, Colleges: Stanford University, <http://colleges.usnews.rankingsandreviews.com/best-colleges/stanford-1305> (listing Stanford's endowment) (last visited Jan. 8, 2012) *with* U. S. News & World Report, Colleges: Mississippi Valley State University, <http://colleges.usnews.rankingsandreviews.com/best-colleges/mississippi-valley-state-2424> (listing MVSU's endowment).

<sup>365</sup> Olivas, *supra* note 300, at 33 ("No other criterion delivers racial results more than does race itself. There is no good proxy, no narrower tailoring, no statistical treatment that can replace race.").

to implement the framework would have to make sufficient investments of human and financial resources.

The third principal difficulty would be providing necessary safety nets to ensure the successful matriculation of students who may experience academic and financial difficulty. The effects of background inequalities do not end with a grant of admission; they often linger.<sup>366</sup> Schools not only have an obligation to broadened educational opportunity, but they must also ensure that these opportunities are premised on success. For example, law school accreditation standards dictate that “A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.”<sup>367</sup> Mandates like this are often used to justify restricting admission only to applicants who satisfy limited notions of merit. The Achievement Framework, however, would necessitate the framing of these mandates as requiring robust support services as a response to the broadening of opportunity. Critics often assert that academic difficulties betoken an undeserved opportunity and can actually harm the student.<sup>368</sup> But this elitist-tinged, and largely discredited,<sup>369</sup> trope only ensures that selective admissions remain the preserve of the advantaged. The egalitarian goals of the Achievement Framework, however, would necessitate the embedding of academic and financial support programs premised on accounting on the back end for unjust inequality on the front end.

## CONCLUSION

In its best form, a meritocracy operates in an environment of equality and social cooperation. Every person has a fair chance of ascending the meritocratic hierarchy. In its worst form, a meritocracy preserves power relationships and maintains inequality. Unfortunately, the American meritocracy does the latter, tightening the “Gordian knot binding race to

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<sup>366</sup> Gaertner, *supra* note 343, at 35 (discussing the expectation of lower graduation rates and other outcomes among students admitted through Colorado’s class-based affirmative action program).

<sup>367</sup> AM. BAR ASSOC., *supra* note 83, at 35.

<sup>368</sup> Richard H. Sander, *Class in American Legal Education*, 88 Denver U. L. Rev. 631, 666 (2011) (“The current large preferences used by law schools nearly double the bar failure rate among African American law graduates.”).

<sup>369</sup> See, e.g., BOWEN ET AL., *supra* note 349, at 209 (arguing that attending a more selective college actually improved graduation rates among black males, in direct contradiction of the “overmatch” hypothesis proffered by opponents of race-conscious affirmative action).



class.”<sup>370</sup> This inequality does more than deprive people of money and opportunities; it humiliates them, while also stunting their imagination and sense of possibility.<sup>371</sup> When a child’s success or failure in life is determined largely by the family into which he is born, and not by his own talents and work ethic, then our meritocracy is broken. To fix it, our notions of merit need to be reimagined in ways that reward achievement—one’s accomplishments in light of one’s background.

On election night in 2012, conservative political commentator Bill O’Reilly was asked to explain how President Barack Obama could be reelected, in spite of the country’s sour mood. O’Reilly offered:

*The demographics are changing. It’s not a traditional America any more. And there are 50% of the voting public who want stuff...Many of them, feel as if the economic system is stacked against them. And they want stuff.*<sup>372</sup>

Unsurprisingly, O’Reilly caught much criticism for these comments. Many people viewed them as racially insensitive and motivated by political sour grapes.<sup>373</sup> Comedian Jon Stewart lampooned them as out of touch.<sup>374</sup> But O’Reilly is mostly correct. The demographic changes are well-documented.<sup>375</sup> Traditional America, as lamenters of O’Reilly’s ilk define it, is gone. And good riddance. There is a significant proportion of Americans who rightly feel the system is stacked against them. And, yes, they want stuff. In a verse illustrating the perils facing poor black urban youth, rapper Nasir Jones remarked, “I would be Ivy League if America

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<sup>370</sup> KATZNELSON, *supra* note 98, at 143.

<sup>371</sup> *Id.* at 172.

<sup>372</sup> Youtube.com, FOX TV Host Bill O’Reilly: “The White Establishment Is Now The Minority,” <http://www.youtube.com/watch?v=IhoOIG-dxeU> (last visited on Dec. 26, 2012).

<sup>373</sup> See, e.g., Bill “Sore Loser” O’Reilly: *Traditional America is Gone*, CURRENT, Nov. 16, 2012, [http://current.com/community/93964026\\_bill-sore-loser-oreilly-traditional-america-is-gone.htm](http://current.com/community/93964026_bill-sore-loser-oreilly-traditional-america-is-gone.htm).

<sup>374</sup> The Daily Show with Jon Stewart, *It Was the Best of Times, It Was the Best of Times*, COMEDY CENTRAL, Nov. 15, 2012, <http://www.thedailyshow.com/watch/thu-november-15-2012/it-was-the-best-of-times--it-was-the-best-of-times> (“Bill O’Reilly celebrates America’s greatest tradition -- a fevered ruling class lamenting the rise of a diverse new class that will destroy the American experiment.”)

<sup>375</sup> See, e.g., Sarah Kliff et. al, *The 2012 Election in Charts*, WASH. POST, Nov. 7, 2012, <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/07/the-2012-election-in-charts/> (noting changes, some dramatic, in the racial composition of the electorate).

played fair.”<sup>376</sup> This assertion, which is believable given the depth of Nas’s intelligence and creativity, captures the “stuff” that *all* Americans desire—fairness, equality, and opportunity. A true meritocracy.

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<sup>376</sup> Youtube.com, Rick Ross “Triple Beam Dreams” Lyrics,  
<http://www.youtube.com/watch?v=YBp-v2n2Aok> (last visited on Dec. 31, 2012).